No. 94-500-CFX
Status: GRANTED

Title: Commissioner of Internal Revenue, Petitioner
v.
Erich E. Schleier and Helen B. Schleier

Docketed:
September 19, 1994

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Joyce,Thomas F.

Entry	Date	Note	Proceedings and Orders
1	Sep 19 1994	G	Petition for writ of certiorari filed.
2	Oct 21 1994		Brief of respondents Erich E. Schleier, et ux. in opposition filed.
3	Oct 26 1994		DISTRIBUTED. November 10, 1994 (Page 1)
4	Nov 3 1994	X	Reply brief of petitioner filed.
5	Nov 14 1994		Petition GRANTED.
			**********
6	Nov 30 1994	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
7	Dec 12 1994		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
8	Dec 29 1994		Brief of petitioner Commissioner of Internal Revenue filed.
9	Jan 30 1995		SET FOR ARGUMENT MONDAY, MARCH 27,1995. (1ST CASE).
10	Feb 2 1995		CIRCULATED.
11	Feb 6 1995	X	Brief amici curiae of American Association of Retired Persons, et al. filed.
12	Feb 6 1995	X	Brief amicus curiae of Equal Employment Advisory Council filed.
13	Feb 6 1995	X	Brief amicus curiae of Migrant Legal Action Program, Inc. filed.
14	Feb 6 1995	X	Brief amicus curiae of Pan Am Pilots Tax Group filed.
15	Feb 6 1995	X	Brief of respondents Erich Schleier, et ux. filed.
16	Feb 23 1995	*	Record filed. Partial record proceedings United States Court of Appeals for the Fifth Circuit.
17	Mar 10 1995	X	Reply brief of petitioner filed.
18	Mar 27 1995		ARGUED.

No.

In the Supreme Court of the United States

OCTOBER TERM, 1994

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ERICH E. AND HELEN B. SCHLEIER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

KENT L. JONES
Assistant to the Solicitor General

ANN B. DURNEY
EDWARD T. PERELMUTER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether back pay and liquidated damages received in settlement of litigation under the Age Discrimination in Employment Act of 1967 are excluded from gross income under Section 104(a)(2) of the Internal Revenue Code as "damages received * * * on account of personal injuries or sickness" (26 U.S.C. 104(a)(2)).

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No.

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ERICH E. AND HELEN B. SCHLEIER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 68a-69a) is unpublished, but the decision is noted at 26 F.3d 1119 (Table). The opinion of the Tax Court (App., *infra,* 64a-65a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 61(a) of the Internal Revenue Code, 26 U.S.C. 61(a), provides in relevant part:

> Except as otherwise provided in this subtitle, gross income means all income from whatever source derived.

2. Section 104(a) of the Internal Revenue Code, 26 U.S.C. 104(a), provides in relevant part:

> Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—
>
> * * * * *
>
> (2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness
>
> * * * * *

3. Section 1.104-1(c) of the Treasury Regulations, 26 C.F.R. 1.104-1(c), provides:

> Section 104(a)(2) [of the Internal Revenue Code] excludes from gross income the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness. The term "damages received (whether by suit or agreement)" means an amount received (other than workmen's compensation) through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution.

STATEMENT

1. Respondent Erich E. Schleier is a former employee of United Airlines, Inc.[1] Pursuant to an established policy of United Airlines, respondent's employment was terminated when he reached the age of sixty (Tax Ct. Pet. 2-3). Respondent thereafter filed a complaint in federal district court alleging that his termination violated the Age Discrimination in Employment Act of 1967 (ADEA), which (with exceptions not relevant here) makes it "unlawful for an employer * * * to discharge any individual * * * because of such individual's age" (29 U.S.C. 623(a)(1)). The remedies for an unlawful discharge under the ADEA include reinstatement, back pay, injunctive and declaratory relief and attorneys fees. See 29 U.S.C. 626(b); 29 U.S.C. 216(b), 217. The ADEA also authorizes an additional award of "liquidated damages" in an amount equal to the backpay award "in cases of willful violations" of that Act. 29 U.S.C. 626(b).

Respondent's complaint was consolidated within a class action suit against United Airlines. On June 30, 1986, the class action was settled under an agreement providing for monetary payments to the class members. One half of the settlement payment was attributed to "back pay"; the other half of the payment was attributed to "liquidated damages." As a result of the settlement, respondent received "back pay" of $72,814.50 and "liquidated damages" in the same amount (Tax Ct. Pet. 4-5).

Respondent reported the "back pay" as income on his 1986 tax return. He did not, however, report the "liquidated damages" that he received under the settlement. The Commissioner of Internal Revenue issued a notice of deficiency to respondent, asserting that the liquidated dam-

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[1] Respondent's wife Helen is a party to this case solely because the couple filed a joint income tax return during the year in question.

ages were improperly excluded from his income, resulting in a deficiency of $35,918.50 in respondent's income tax for 1986 (Tax Ct. Pet. 2).

2. Respondent commenced this case in Tax Court to obtain a redetermination of the asserted deficiency. The petition alleged that the "liquidated damages" portion of the settlement payment was properly excluded from gross income under Section 104(a)(2) of the Internal Revenue Code, which provides that "gross income does not include" (26 U.S.C. 104(a)(2))

> the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness.

The petition further alleged that the "back pay" portion of the settlement payment, which had been reported as income on respondent's 1986 return, was also excludable from gross income under Section 104(a)(2). Respondent therefore sought a determination of overpayment (as authorized by 26 U.S.C. 6512(b)).

a. Proceedings on respondent's case were deferred pending the Tax Court's disposition of the lead case arising out of the United Airlines class action settlement, *Downey* v. *Commissioner,* 97 T.C. 150 (1991), supplemental opinion, 100 T.C. 634 (1993), rev'd, No. 93-3763 (7th Cir. Aug. 30, 1994).

In its original opinion in *Downey* (App., *infra,* 1a-39a), the Tax Court (in a reviewed opinion with six judges dissenting in part) held that back pay and liquidated damages received under the ADEA are excludable from gross income under Section 104(a)(2). With respect to back pay, the Tax Court expressly adopted (App., *infra,* 21a-24a) the reasoning of *Rickel* v. *Commissioner,* 900 F.2d 655 (3d Cir. 1990), and *Pistillo* v. *Commissioner,* 912 F.2d 145

(6th Cir. 1990), which held that back pay awards under the ADEA are excludable from gross income because (i) an ADEA suit alleges a violation of a duty that arises by operation of a statute and not by virtue of a contract and (ii) statutes addressing discrimination in the workplace had been characterized by other courts as involving personal injury. 900 F.2d at 662-663; 912 F.2d at 149-150.

With respect to liquidated damages, the Tax Court in *Downey* rejected the Commissioner's contention that ADEA liquidated damages—like punitive damages—are paid because of the employer's willful misconduct, rather than "on account of personal injuries" (26 U.S.C. 104(a)(2)) to the employee, and are therefore not excluded from gross income under the plain language of the statute. App., *infra,* 26a. See *Commissioner* v. *Miller,* 914 F.2d 586, 589-591 (4th Cir. 1990). The Tax Court held that, while ADEA liquidated damages serve a punitive purpose, these damages, when viewed from the victim's perspective, represent compensation for nonpecuniary losses. App., *infra,* 26a-29a.

b. The Tax Court withheld entry of its final decision in *Downey* pending this Court's decision in *United States* v. *Burke,* 112 S. Ct. 1867 (1992). In *Burke,* this Court held that back pay awards received in settlement of litigation under the pre-1991 version of Title VII of the Civil Rights Act of 1964 are not excludable from gross income under Section 104(a)(2). In reaching that conclusion, the Court emphasized that a statute "whose sole remedial focus is the award of backwages" (112 S. Ct. at 1874) does not represent a tort-like remedy of a personal injury but instead represents redress for "legal injuries of an economic character" (*id.* at 1873, quoting *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 418 (1975)). The Court concluded that a backpay remedy that redresses an economic injury

is "not excludable from gross income as 'damages received . . . on account of personal injuries' under § 104(a)(2)." 112 S. Ct. at 1874.

After this Court issued its decision in *Burke,* the Tax Court granted the Commissioner's motion for reconsideration of the *Downey* decision. In a supplemental opinion in *Downey* (with several separate opinions), the Tax Court emphasized that one of the hallmarks of traditional tort liability is the availability of a broad range of damages to compensate the victim, as well as punitive damages when the defendant's misconduct was intentional or reckless. App., *infra,* 42a. The Tax Court observed that, in contrast with the pre-1991 version of Title VII involved in *Burke* (which limited the available remedies to back pay and equitable relief, see 112 S. Ct. at 1872-1874 & nn.8, 12), the ADEA provides "a range of remedies, including both unpaid wages and 'liquidated damages.' " App., *infra,* 44a. The Tax Court concluded that the ADEA "evidences a tort-like conception of injury and remedy" because "liquidated damages" under the ADEA compensate the victim of age discrimination for non-pecuniary losses and also serve a deterrent or punitive purpose. App., *infra,* 45a. The Tax Court therefore reaffirmed its prior holding in *Downey* that all damages received in ADEA litigation are excludable from gross income under Section 104(a)(2). App., *infra,* 45a.

c. On July 7, 1993, the Tax Court entered an order in the present case granting respondent's motion for summary judgment based on the court's ruling in *Downey.* App., *infra,* 64a-65a.

3. The Commissioner appealed from the Tax Court's rulings in this case and in *Downey.* While these appeals were pending, the Fifth Circuit endorsed and adopted the Tax Court's decision in *Downey* in the course of addressing a damages issue in private ADEA litigation in which

the United States was not a party and did not participate. *Purcell* v. *Seguin State Bank & Trust Co.,* 999 F.2d 950, 961 (1993).[2] The court in *Purcell* agreed with the Tax Court's reasoning that "ADEA claims are tort-like and that an entire ADEA award is nontaxable." *Ibid.*

a. Because the Fifth Circuit had recently endorsed the Tax Court's *Downey* decision in *Purcell,* the Commissioner filed a suggestion that the appeal in respondent's case be heard *en banc.* The Fifth Circuit rejected that suggestion (App., *infra,* 67a). The three-judge panel assigned to this case then entered a decision in favor of respondent solely on the authority of *Purcell* (App., *infra,* 68a-69a).

b. On the Commissioner's appeal from the *Downey* decision, the Seventh Circuit reversed the Tax Court, holding that ADEA backpay and liquidated damages awards are *not* excluded from income under Section 104(a)(2) (App., *infra,* 70a-77a). The Seventh Circuit reasoned that (*id.* at 6a):

> Burke stands for the proposition that a federal anti-discrimination statute must provide compensatory damages for intangible elements of personal injury (such as pain and suffering, emotional distress, or personal humiliation) to constitute a tort-type personal injury and receive tax exempt treatment under sec. 104(a)(2).

The court noted that the only damages remedies under the ADEA were back pay and liquidated damages and that neither of those remedies "compensate for the intangible elements of a personal injury" (App., *infra,* 77a). Because

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[2] In *Purcell,* the court concluded that an addition to an ADEA backpay award to take account of the employee's income tax liabilities would be improper because, under the Tax Court's ruling in *Downey,* the ADEA award would not be subject to tax under Section 104(a)(2) of the Code. See 999 F.2d at 961.

the limited remedies available under the ADEA thus lack "an essential element of a tort-type claim," the Seventh Circuit concluded that, under this Court's analysis in *Burke,* the damages awarded under that statute "cannot be excluded from taxation under sec. 104(a)(2)" (App., *infra,* 77a).

c. In an appeal involving a different party to the United Airlines settlement, the Ninth Circuit affirmed a Tax Court decision based upon *Downey. Schmitz* v. *Commissioner,* No. 93-70960 (Aug. 30, 1994) (App., *infra,* 78a-96a). In *Schmitz,* the Ninth Circuit agreed with the Tax Court that the ADEA represents a "tort-like" cause of action, reasoning that the "ADEA's liquidated damages provision, as well as its provision for jury trials, distinguishes ADEA from the statute discussed in *Burke*" (*id.* at 84a). The court of appeals concluded that ADEA recoveries were therefore excluded from tax under Section 104(a)(2).

In *Schmitz,* the Ninth Circuit also rejected the Commissioner's additional contention that, if ADEA represents a "tort-type" recovery for a personal injury, the liquidated damages component of that recovery would be subject to tax in any event because it does not represent an award "on account of personal injuries" (26 U.S.C. 104(a)(2)) but is instead a penalty "on account of" the employer's willful misconduct. App., *infra,* 85a-91a. The court stated that liquidated damages under the ADEA are excluded from tax under Section 104(a)(2) because they are designed "to compensate victims for damages which are too obscure and difficult to prove" (App., *infra,* 87a).

REASONS FOR GRANTING THE PETITION

The Fifth, Seventh and Ninth Circuits have issued conflicting decisions on review of the same Tax Court opinion.

The Fifth and Ninth Circuits, in *Commissioner* v. *Schleier* and *Schmitz* v. *Commissioner,* held that the Tax Court correctly concluded in *Downey* that backpay and liquidated damages awards under the ADEA are to be excluded from gross income as "damages received * * * on account of personal injuries" under Section 104(a)(2) of the Internal Revenue Code (App., *infra,* 69a, 91a (respectively)). In *Downey* v. *Commissioner,* however, the Seventh Circuit reached exactly the opposite conclusion (App., *infra,* 77a). In reaching these conflicting results, the courts of appeals relied on different understandings of the interpretation of Section 104(a)(2) set forth in this Court's decision in *United States* v. *Burke,* 112 S. Ct. 1867 (1992). Absent further review by this Court, these conflicting understandings of *Burke* by the courts of appeals will result in disparate tax treatment of otherwise identically situated taxpayers (including the many parties who participated in the same class action settlement of the United Airlines ADEA litigation).[3]

The proper treatment of ADEA recoveries, as well as other types of statutory recoveries, under Section 104(a)(2) of the Internal Revenue Code represents a recurring question of substantial administrative importance. The issues addressed in this case affect many thousands of individuals who have received, or will receive in the future, damage awards under the ADEA and other state and federal statutory schemes.

1. Section 104(a)(2) of the Code provides that gross income does not include "the amount of any damages received (whether by suit or agreement * * *) on account of personal injuries or sickness." 26 U.S.C. 104(a)(2). By

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[3] Additional appeals in cases governed by the Tax Court's *Downey* decision, involving other parties to the United Airlines settlement, are currently pending in the Tenth and Eleventh Circuits.

regulation, the Treasury has defined the term "damages received" within this statute to mean "an amount received * * * through prosecution of a legal suit or action based upon tort or tort type rights or through a settlement agreement entered into in lieu of such prosecution." 26 C.F.R. 1.104-1(c). Under the statute, as amplified by the regulation, a recovery may be excluded from gross income only when it both (i) was received through prosecution or settlement of a suit or action based upon tort or tort-type rights (*ibid.*) and (ii) was received "on account of personal injuries or sickness" (26 U.S.C. 104(a)(2)).[4]

[4] In a concurring opinion in *United States* v. *Burke*, Justice Scalia noted that these two requirements are logically distinct. 112 S. Ct. at 1875 n.1. Justice Scalia indicated, however, that he understood an IRS ruling and the government's brief in *Burke* to have treated the two requirements as one. *Ibid.* We respectfully disagree with that conclusion. The brief for the United States in *Burke* (91-42 U.S. Br. at 24) states:

> Even if Title VII could properly be regarded as involving a "tort type" right within the meaning of the regulation, back pay would nonetheless not be excludable under Section 104(a)(2) because the injury suffered by respondents (and the injury for which they were compensated under Title VII) was not a personal injury, but rather an injury to their economic interests.

The government's brief in *Burke* further noted that (*id.* at 23 n.17):

> The exclusion for damages received "on account of personal injuries" is not an exclusion for all tort damages. Many tort claims do not involve injuries to the person, but rather injuries to property or other economic interests, *e.g.*, claims for injuries to property, fraud, tortious interference with a contract, and trade libel. Although all "personal injuries" for purposes of Section 104(a)(2) involve tort or tort-like claims, not all tort or tort-like claims involve personal injuries.

The government's brief in *Burke* concluded that, even if Title VII were a "tort like" remedy, the award would not be excluded from income under Section 104(a)(2) because "the discrimination addressed by Title VII 'deals with legal injuries of an economic character.' " (91-42 U.S.

In *United States* v. *Burke*, 112 S. Ct. 1867 (1992), this Court applied these principles to conclude that back pay received under the pre-1991 version of Title VII of the Civil Rights Act of 1964 was not excludable from gross income. The Court noted that Title VII's circumscribed remedial scheme, which was then limited to back pay and injunctive relief (see 112 S. Ct. at 1874 n.12), focused exclusively on the economic injury (lost wages) resulting from employment discrimination and provided no compensation for "traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other consequential damages" (*id.* at 1873).[5] The limited remedy under that statute therefore did not constitute "damages received * * * on account of personal injuries" within the meaning of Section 104(a)(2). 112 S. Ct. at 1873-1874.[6]

Br. at 24, quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975)). In concluding in *Burke* that backpay awards under the pre-1991 version of Title VII did not represent damages received on account of a personal injury, the Court similarly noted that "Title VII focuses on 'legal injuries of an economic character,' see *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 * * * (1975)" (112 S. Ct. at 1873).

[5] The availability of compensatory damages for intangible elements of personal injury such as pain and suffering and emotional distress is an essential characteristic of a personal injury tort action. See *Vicksburg & Meridian R.R.* v. *Putnam*, 118 U.S. 545, 554 (1886); 3 L. Frumer & M. Friedman, *Personal Injury* § 3.01, at 94 (1991); 2 S. Speiser, C. Krause & A. Gans, *The American Law of Torts* § 8:18, at 552 (1985). Awards for pain and suffering are estimated to account for 72% of damages in personal injury litigation. *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 462 U.S. 523, 552 n.35 (1983).

[6] The Court's opinion in *Burke* did not resolve whether back pay received under a federal antidiscrimination statute could *ever* be excludable from gross income under Section 104(a)(2). The Internal Revenue Service concluded after *Burke*, however, that recoveries under statu-

Applying this Court's decision in *Burke,* the Seventh Circuit properly concluded in *Downey* v. *Commissioner* (App., *infra,* 77a) that back pay and liquidated damages received under the ADEA are not excludable from gross income under Section 104(a)(2). The ADEA, like the pre-1991 version of Title VII involved in *Burke,* does not represent a tort-type action for a personal injury. The only difference between the remedial scheme provided by the pre-1991 version of Title VII and the remedial scheme provided by the ADEA is that employees may recover "liquidated damages" under the ADEA when—but only when—the employer has engaged in "willful violations" of the statute (29 U.S.C. 626(b)).[7] The ADEA does not provide compensation for "traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other consequential damages" (*United States* v. *Burke,* 112 S. Ct. at 1873). See *e.g., Haskell* v. *Kaman Corp.,* 743 F.2d 113, 120-121 & n.2 (2d Cir. 1984). The ADEA thus does not provide a tort-type remedy for personal injuries. See *United States* v. *Burke,* 112 S. Ct. at 1873.[8]

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tory schemes (such as the post-1991 provisions of Title VII) that provide back pay along with remedies for "traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, [and] other consequential damages" (112 S. Ct. at 1873), are excluded from income by Section 104(a)(2). See Rev. Rul. 93-88, 1993-2 C.B. 61.

[7] Federal employees may not recover liquidated damages under the ADEA. *Smith* v. *OPM,* 778 F.2d 258, 263 (5th Cir. 1985), cert. denied, 476 U.S. 1105 (1986).

[8] ADEA litigants are entitled to jury trials. *Lorillard* v. *Pons,* 434 U.S. 575 (1978). In *Burke,* the Court noted that jury trials were not available under the pre-1991 version of Title VII. See 112 S. Ct. at 1872. While the lack of a right to a jury trial may indicate that the remedy is *not* "tort-type" in nature (see *id.* at 1873), the availability of a jury trial does not indicate that the right *is* tort-type. At common law, jury trials were available for contract, as well as tort, claims.

Under the ADEA, as in *Burke,* the focus of the statutory backpay remedy is exclusively on the economic, rather than personal, injuries of the employee. Liquidated damages under the ADEA are also not available as compensation for personal injuries that a discharged employee may have incurred. Instead, liquidated damages under the ADEA (like many other types of statutory penalties) are available only when needed to punish the intentional wrongdoer for "willful violations" of the law (29 U.S.C. 626(b)). As the Seventh Circuit correctly observed in reversing the Tax Court's *Downey* decision, damages for "willful violations" of the law represent an enforcement penalty and "do not compensate for the intangible elements of a personal injury" (App., *infra,* 77a).[9] See also *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 350 (1974) (Punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."). The ADEA remedy does not qualify for exclusion under Section 104(a)(2) because, although it redresses the economic injury of the victim of age discrimination, it provides no compensation for any associated or consequential personal injuries resulting from the discrimination.

The contrary holdings of the Fifth Circuit in the present case (App., *infra,* 69a) and of the Ninth Circuit in *Schmitz* v. *Commissioner* (App., *infra,* 91a) err in accepting the Tax Court's conclusion in *Downey* that the ADEA provides a "range of remedies" as compensation for non-economic, personal injuries (App., *infra,* 44a). Neither the

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[9] Liquidated damages are not a tort remedy; they are an ordinary remedy for breach of contract. See *Rex Trailer Co.* v. *United States,* 350 U.S. 148, 151 (1956). The statute's use of the term "liquidated damages," however, does not obscure the fact that such damages, when awarded solely for "willful violations" of the Act, constitute an enforcement penalty.

award of back pay, nor the enforcement penalty for willful violations of the Act, compensates the victims of age discrimination for the "traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, [and] other consequential damages" (*United States* v. *Burke,* 112 S. Ct. at 1873).

2. Even if the ADEA were thought to represent a tort-type remedy for a personal injury, any liquidated damages awarded under that Act would not be excludable from gross income under Section 104(a)(2). When applicable, Section 104(a)(2) permits exclusion only of damages received "on account of" personal injuries (26 U.S.C. 104(a)(2)). As the Fourth Circuit concluded in *Commissioner* v. *Miller,* damages awarded as punishment of a wrongdoer, rather than as compensation for an injury, are awarded "on account of" malice or willfulness, not "on account of" personal injury. 914 F.2d at 589-592. Accord, *Hawkins* v. *United States,* No. 93-15828 (9th Cir. July 19, 1994); *Reese* v. *United States,* 24 F.3d 228, 230-235 (Fed. Cir. 1994). Punitive damages and statutory penalties for "willful violations" of the law thus do not come within the literal terms of the exclusion from income provided by Section 104(a)(2).[10] That conclusion, which

[10] In 1989, Section 104(a)(2) was amended to provide that its exclusion "shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness." Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7641(a), 103 Stat. 2379. In *Burke,* this Court suggested that this amendment "allow[s]" the exclusion of punitive damages in physical injury cases after 1989. 112 S. Ct. at 1871 n.6. That question, however, was not presented in *Burke* and had not been addressed by the parties in that case. The Court's statements on that issue in *Burke* were therefore dicta. The proper interpretation of the 1989 amendment is also not at issue in the present case, which does not involve a physical injury and instead involves an unlawful discharge and an associated tax return which preceded the 1989 amendment.

appears plain enough on the face of the statute, is also supported by the fundamental principle of statutory construction that exclusions from income are to be construed strictly in favor of the government. See *United States* v. *Burke,* 112 S. Ct. at 1878 (Souter, J., concurring); *United States* v. *Centennial Savings Bank,* 499 U.S. 573, 583-584 (1991).

Although the Fifth Circuit did not specifically address this separate issue in this case, the court of appeals necessarily rejected the government's contentions by affirming the Tax Court's judgment.[11] The Ninth Circuit, by contrast, *did* address this separate issue in affirming the Tax Court's *Downey* decision in *Schmitz* v. *Commissioner* (App., *infra,* 85a-91a). In *Schmitz,* the Ninth Circuit concluded that, even though liquidated damages under the ADEA are awarded only for "willful violations" of the Act, such damages nonetheless serve the "compensatory purpose" of providing a remedy for "obscure and difficult to prove compensatory damages" (*ibid.*). The Ninth Circuit dismissed as "simply * * * a public policy matter" that liquidated damages under the ADEA are made available only to victims of "willful discrimination" (*ibid.*).

In our view, the conclusion expressly reached on this separate issue by the Ninth Circuit in *Schmitz* (and reached, *sub silentio,* by the Fifth Circuit in the present case) conflicts with the conclusion of the Fourth and Federal Circuits in *Commissioner* v. *Miller, supra,* and *Reese* v. *United States, supra,* that damages awarded to penalize a wrongdoer are not awarded "on account of personal injuries" within the meaning of Section 104(a)(2).[12]

[11] The Commissioner raised the separate issue of the excludability of liquidated damages for "willful violations" of the Act in the courts below. See Comm. C.A. Br. 27n.15, 28n.16; Comm. C.A. Reply Br. 16-17.

[12] In *Commissioner* v. *Miller,* 914 F.2d at 591, however, the Fourth Circuit distinguished its conclusion in that case that punitive damages

Moreover, as Judge Trott noted concurring in the result in *Schmitz* (App., *infra*, 91a-92a), the Ninth Circuit's decision on this issue also conflicts with the Ninth Circuit's own prior decision in *Hawkins* v. *United States, supra*. See also App., *infra*, 92a-93a.

3. The recurring question presented in this case has substantial administrative importance. It affects countless individuals who have received, or will receive, monetary remedies under the ADEA and other state and federal statutory schemes. The proper income tax treatment of such statutory remedies also has important collateral consequences in damages litigation, where courts consider the taxability of the award in determining its proper amount. See *Purcell* v. *Seguin State Bank & Trust Co.*, 999 F.2d at 960-961.

In the absence of a decision from this Court resolving the conflict among the courts of appeals, the tax treatment of ADEA and other statutory awards will differ based solely upon geographic happenstance. Resolution of this recurring issue is needed to avoid continuing uncertainty and uneven application of the revenue laws.

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are not excludable under Section 104(a)(2) from its holding in *Thompson* v. *Commissioner*, 866 F.2d 709 (1988), that liquidated damages under the Equal Pay Act *are* excludable on the ground that those liquidated damages serve, at least in part, a compensatory purpose. That analysis, which the Ninth Circuit also adopted in this case (App., *infra*, 89a), conflicts with the Seventh Circuit's decision in *Downey* v. *Commissioner, supra*, which concludes that liquidated damages awarded only on account of "willful violations" of the Act are not compensation for intangible injuries and are therefore not excludable (App., *infra*, 77a). Similarly, the Ninth Circuit's prior decision in *Criswell* v. *Western Airlines, Inc.*, 709 F.2d 544, 556 (1983), aff'd on other grounds, 472 U.S. 400 (1985), the Second Circuit's decision in *Reichman* v. *Bonsignore, Brignati & Mazzota P.C.*, 818 F.2d 278, 282 (1987), and the Eleventh Circuit's decision in *Lindsey* v. *American Cast Iron Paper Co.*, 810 F.2d 1094, 1102 (1987), all conclude that liquidated damages under the ADEA are punitive rather than compensatory. See also *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 125-126 (1985).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
KENT L. JONES
Assistant to the Solicitor General
ANN B. DURNEY
EDWARD T. PERELMUTER
Attorneys

SEPTEMBER 1994

APPENDIX A

UNITED STATES TAX COURT

97 T.C. No. 10
Docket No. 11120-89

BURNS P. DOWNEY AND MARJORIE DOWNEY, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Filed July 31, 1991

P, an airline pilot, sued his former employer under the Age Discrimination in Employment Act of 1967 (ADEA) claiming that certain actions of his employer constituted unlawful age discrimination in violation of the ADEA and that such actions were a willful violation of the ADEA. P received the amount of $120,000 in settlement of his ADEA claim. One-half of the settlement amount was allocated to "nonliquidated damages," and one-half to "liquidated damages." *Held,* under sec. 104(a)(2), an ADEA claim is a tort or tort-like claim to redress a personal injury. *Held further,* we overrule in part our decision in *Rickel v. Commissioner,* 92 T.C. 510 (1989), affd. in part and revd. in part 900 F.2d 655 (3d Cir. 1990), and we overrule our decision in *Pistillo v. Commissioner,* T.C. Memo. 1989-329, revd. 912 F.2d 145 (6th Cir. 1990). *Held further,* nonliquidated damages, or back pay, under the ADEA compensate the vcitim for pecuniary losses arising from age discrimination. *Held further,* liquidated damages under the ADEA compensate such victim for certain nonpecuniary losses arising from age discrimination. *Held further,*

petitioners, accordingly, are entitled under sec. 104(a)(2) to exclude from gross income the nonliquidated and the liquidated damages received in settlement of the ADEA claim.

Steven E. Reick, for the petitioners.

Majority A. Gilbert, James F. Hanley, Jr., and *Jan E. Lamartine,* for the respondent.

OPINION

HALPERN, *Judge*:* Respondent has determined a deficiency of $43,237 [1] in petitioners' federal income tax for 1985, together with additions to tax under section 6653(a) and 6661 (since conceded by respondent). This case requires us to determine the taxability of an amount received in settlement of a suit brought under the Age Discrimination in Employment Act of 1967, as amended (the ADEA). Pub. L. 90-202, 81 Stat. 602-608 (29 U.S.C. secs. 621-634). In their petition, petitioners assign error to respondent's determination that the portion of such amount received and categorized as liquidated damages constitutes gross income, subject to tax. By an amendment to their petition, petitioners assign error to their inclusion in gross income of the portion of the settlement amount categotized as nonliquidated damages. The question for our consideration is whether all or any portion of the settlement amount is excludable from gross income under

* By Order of the Chief Judge, this case was reassigned and submitted to Judge James S. Halpern for disposition.

[1] The parties have stipulated that respondent determined a deficiency of $42,237. Any inconsistency can be resolved in the Rule 155 computation. Unless otherwise indicated, all section references are to the Internal Revenue Code of 1954 as amended and in effect for the year in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

section 104(a)(2). Section 104(a)(2) allows for the exclusion of "the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness."

The parties have submitted this case fully stipulated, and the facts so stipulated are found accordingly. By this reference, the stipulation of facts and the attached exhibits are incorporated herein.

Background

Petitioners are husband and wife. At the time of filing their petition, petitioners resided in Oak Park, Illinois. When used in the singular, the term "petitioner" is intended to refer to petitioner husband, Burns P. Downey.

The Age Discrimination in Employment Act

As a preliminary matter, we will describe relevant aspects of the ADEA. The ADEA broadly prohibits arbitrary discrimination in the workplace based on age. *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 120 (1985). See 29 U.S.C. sec. 623(a).[2] The preamble to the ADEA declares that its purpose is "to promote employment of older persons based on their ability rather than age [and] to prohibit arbitrary age discrimination in employment." 29 U.S.C. sec. 621(b). section 4(a)(1) of the ADEA proscribes differential treatment of workers between the ages of 40 and 70 "with respect to * * * compen-

[2] The ADEA (29 U.S.C. sec. 623(a)(1)) provides in part that:

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; * * *

sation, terms, conditions, or privileges of employment." 29 U.S.C. secs. 623(a)(1), 631(a).

Section 7(b) of the ADEA provides that the rights created by the ADEA are to be "enforced in accordance with the powers, remedies, and procedures" of the Fair Labor Standards Act (the FLSA). See 29 U.S.C. sec. 626(b) (ADEA provision incorporating 29 U.S.C. secs. 211(b), 216(b), 216(c), and 217).[3] The remedial provisions of the two statutes, though, are not identical.

Under the FLSA, employers who violate minimum wage or maximum hour laws are liable to the affected employees in the amount of their unpaid minimum wages, or their unpaid overtime compensation, and in an additional equal amount as liquidated damages. 29 U.S.C. sec. 216(b). Regarding liquidated damages, however, if the employer shows "that the act or omission giving rise to such action [for unpaid minimum wages or unpaid overtime compensation under the FLSA] was in good faith and that he had reasonable grounds for believing that his act or ommission" did not violate the FLSA, the court may refuse to award liquidated damages. 29 U.S.C. sec. 260.

In contrast, section 7(b) of the ADEA provides that a prevailing plaintiff is entitled to liquidated damages "only in cases of willful violations." 29 U.S.C. sec. 626(b). Of course, as under the FLSA, a plaintiff under the ADEA can recover other than liquidated damages. Section 7(b) empowers the courts "to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under

[3] See also Fair Labor Standards Act of 1938, Pub. L. 75-718, 52 Stat. 1060 (1938) (29 U.S.C. secs. 201-219).

this section." 29 U.S.C. sec. 626(b). In contrast to "liquidated damages" awarded under section 7(b), we will refer to amounts received pursuant to the quoted grant of authority as "nonliquidated damages."

Petitioner's Employment History With United Air Lines, Inc.

Petitioner was born on September 19, 1921. In 1945, petitioner was employed by United Air Lines, Inc. (United), and, by early 1981, petitioner was a captain, flying Boeing 747 jets. Generally, United's flight deck crews included two pilots (i.e., captain and first officer) and a second officer.

To continue flying as a captain, petitioner was required to submit to two Federal Aviation Administration (FAA) physicals a year and to hold a specific FAA medical certificate. On September 1, 1981, the FAA revoked petitioner's medical certificate, and United placed petitioner on sick leave. Pursuant to United's sick leave policy, petitioner, utilizing accumulated sick leave, continued to draw his full salary.

On September 19, 1981, petitioner turned 60 years old. FAA rules barred persons over the age of 60 from serving as captains or first officers, but did not preclude such persons from serving as second officers (the Age 60 Rule). See 14 C.F.R. sec. 121.383(c). United, however, had a somewhat contrary policy. United prohibited persons over the age of 60 who had served as a captain from holding *any* position in the flight deck crew, including that of a second officer. Therefore, on October 1, 1981, the commencement of the first month after petitioner turned 60, United changes petitioner's status from sick leave to retired.

As of October 1, 1981, petitioner ceased earning his captain's salary of $10,182 per month and began receiving

$5,454 a month in retirement benefits. Upon placement in retirement status, petitioner "forfeited" the balance of his accumulated sick leave. Petitioner calculated that, if United had reassigned him to a position as a second officer, rather than retired him, he would have been entitled to approximately $89,794 of additional sick pay.

Petitioner's Suit Against United Air Lines, Inc.

In June 1984, petitioner filed a complaint under the ADEA against United. The complaint was filed in the U.S. District Court, Northern District of Illinois, Eastern Division. *B. Price Downey v. United Air Lines, Inc.*, Docket No. 84 C 5534. Petitioner's complaint alleged that United's refusal to allow petitioner to serve as a second officer after petitioner turned 60 years old constituted unlawful age discrimination and that United's actions were a willful violation of the ADEA. Petitioner's complaint mentions no other grounds for bringing the lawsuit. As relief, petitioner sought in his complaint, inter alia, reinstatement, retroactive seniority rights, employee benefits as if petitioner's employment had not been interrupted, back pay plus interest, and liquidated damages.

In September 1984, petitioner regained his FAA medical certificate. A month later, in October 1984, petitioner applied to be reinstated on a flight deck crew in a position other than captain or first officer. United rejected petitioner's application based on its policy that persons over 60 years of age who had served as a captain were prohibited from holding any position on the flight deck crew, including the position of second officer.

Later in 1984, petitioner's civil action against United was joined with two other ADEA cases also in the U.S. District Court, Northern District of Illinois, Eastern Division. *Monroe v. United Air Lines, Inc.* (Docket No. 79 C 360); *Higman v. United Air Lines, Inc.* (Docket No. 79 C 1572). *Monroe* and *Higman* were the lead cases in a class action suit filed against United prior to the filing of petitioner's complaint and were consolidated themselves for the purpose of trial. Before petitioner filed his 1984 complaint against United, the trial court entered judgment on jury verdicts in favor of the plaintiffs and against United in *Monroe* and *Higman*. On appeal, the U.S. Court of Appeals for the Seventh Circuit reversed and remanded the class action suit on the basis of erroneous jury instructions. *Monroe v. United Air Lines, Inc.*, 736 F.2d 394, 409 (7th Cir. 1984). The parties have stipulated that petitioner's 1984 complaint was filed after the trial court's judgment but before the Seventh Circuit's reversal and remand.

Settlement of ADEA Suit

In late 1985, petitioner and United entered into a settlement agreement (the Settlement Agreement). The parties have stipulated that petitioner and United reached a settlement after the Seventh Circuit's reversal and remand in *Monroe* and *Higman* but before the disposition of the remanded class action suit. Pursuant to the settlement Agreement, petitioner, in consideration for the payment by United of $120,000, released United from all claims arising out of his employment relationship with United, whether or not asserted in the ADEA action.

The Settlement Agreement allocated one-half of United's payment of $120,000 to nonliquidated damages and one-half to liquidated damages. In settlement negotiations, United counsel insisted on language allocating United's payment between nonliquidated and liquidated damages, and petitioner agreed to the allocation to obtain the settlement. The Settlement Agreement stated that the $60,000 attributable to nonliquidated damages would be subject to all tax withholdings and deductions as required by law.

Further, the Settlement Agreement specified that petitioner and United were to execute and file a stipulation to dismiss with prejudice the ADEA action and that the entry by the U.S. District Court of an order dismissing with prejudice the ADEA action was "a necessary condition precedent to any obligation by United to pay" petitioner the sum of $120,000. The recital clauses in the Settlement Agreement referred to petitioner's ADEA action, but did not cite any other claims against United.

Procedural History

On their federal income tax return for 1985, petitioners included as gross income the sum of $60,000 attributable to nonliquidated damages but did not include the sum of $60,000 attributable to liquidated damages. Petitioners claimed under section 212 a deduction in the amount of $40,000 for "legal expenses incurred to recover back pay award."

Upon completion of his examination of petitioners' return, respondent determined that petitioners should have included the $60,000 attributable to liquidated damages and that no amount was deductible as legal fees.[4] As stated, petitioners have challenged respondent's determination that the $60,000 attributable to liquidated damages is includable in gross income and further have asserted that they also should have excluded from gross income the $60,000 attributable to nonliquidated damages.

The parties have stipulated that, if the Court determines that any portion of the $120,000 settlement amount is includable in petitioners' income for 1985, a proportionate part of the disallowed attorneys fees will be allowed as an itemized deduction. The parties have stipulated also that

[4] Respondent also determined that petitioners had omitted from income an unrelated fee of $2,566. Petitioners concede that adjustment.

petitioners are not liable for additions to tax under section 6653(a) or 6661.

Discussion

I. *Introduction*

Neither the Internal Revenue Code nor the ADEA specifically addresses the taxability of amounts received on account of claims under the ADEA. Petitioners argue that such amounts, whether received as liquidated or nonliquidated damages, are excludable from gross income under section 104(a)(2), as damages received on account of personal injuries. In contrast, respondent argues that petitioner's receipt of an amount as nonliquidated damages was in settlement of a claim for back pay, not a claim for personal injuries, and that such amount is not excludable under section 104(a)(2). Respondent further argues that liquidated damages under the ADEA are equivalent to punitive damages and that, therefore, petitioner's receipt of liquidated damages should be treated as is settlement of a claim for punitive damages, which are not excludable under section 104(a)(2).

The parties do not dispute the allocation of the settlement amount into two equal portions, the characterization of those portions as representing, respectively, nonliquidated and liquidated damages under the ADEA (as we have used those terms), or the fact that petitioner received that settlement amount solely on account of his claim under the ADEA. We agree with the parties regarding those matters and find that petitioner received the settlement amount solely on account of his ADEA claim. Thus, we treat the question here as concerning the taxability of nonliquidated and liquidated damages under the ADEA.

II. *The Exclusion from Gross Income of Damages Received on Account of Personal Injuries.*

A. *A Dispute as to the Scope of Section 104(a)(2)*

The dispute between the parties is, in essence, a dispute over the scope of the exclusion from gross income for damages received on account of personal injuries or sickness now found in section 104(a)(2). Since the scope of that exclusion has been subject to a great deal of controversy in other cases, we will begin by exploring in some detail the history and interpretation of that exclusion.

B. *History of the Exclusion*

The exclusion for damages received on account of personal injuries or sickness first appeared in the tax statute in 1918. See Revenue Act of 1918, Pub. L. 65-254, ch. 18, sec. 213(b)(6), 40 Stat. 1057, 1065-1066.[5] Previously, the administrative position of the tax authorities had been that the proceeds of an accident insurance policy were not gains and thus not taxable as income on the theory that such proceeds represented a return of capital. 31 Op. Atty. Gen. 304, 308 (1918). On a similar theory, "an amount received by an individual as the result of a suit or compromise for personal injuries sustained by him through accident" was not considered income subject to taxation. T.D. 2747, 20 Treas. Dec. Int. Rev. 457 (1918). Those administrative positions may have reflected too generous a view of what constitutes a return of capital (a return of capital arguably being beyond the constitutional power to

[5] Section 213(b)(6) of the Revenue Act of 1918 excluded from gross income the following:

> Amounts received, through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness.

Substantially identical language has appeared in each intervening revenue act and codification of the tax law.

tax income). Schlenger, "Disability Benefits Under Section 22(b)(5)," 40 Va. L. Rev. 549, 550-552 (1954).

The legislative history of the Revenue Act of 1918 suggests that Congress also was of the view that compensation received for, or damages received on account of, personal injuries or sickness was beyond the reach of the income tax. The relevant House report states that:

> Under the present law it is doubtful whether amounts received through accident or health insurance, or under workmen's compensation acts, as compensation for personal injury or sickness, and damages received on account of such injuries or sickness, are required to be included in gross income. The proposed bill provides that such amounts shall not be included in gross income.

H. Rept. No. 767, 65th Cong., 2d Sess. 9-10 (1918), reprinted in 1939-1 C.B. (Part 2) 86, 92.

Likewise, judicial decisions of the period dealing with damages received on account of personal injuries reflect the view that such recoveries did not give rise to income. In *Hawkins v. Commissioner,* 6 B.T.A. 1023 (1927), the Board of Tax Appeals held that compensatory damages received for libel and slander were not taxable as income. The Board found that "Such compensation as general damages adds nothing to the individual, for the very concept which sanctions it prohibits that it shall include a profit. It is an attempt to make the plaintiff whole as before the injury." Id. at 1025. See *Clark v. Commissioner,* 40 B.T.A. 333, 335 (1939) ("The theory of those cases [i.e., *Hawkins v. Commissioner, supra,* and several oher earlier cases] is that recoupment on account of such losses is not income.").

We doubt whether the return of capital theory justifies the exclusion from income of the full range of damages

found to be excludable under section 104(a)(2), particularly damages received in lieu of lost income. Perhaps, even originally, a more satisfactory justification for excluding a recovery for lost earnings as well as a recovery for pain and suffering may have been based on emotional and traditional, rather than logical, factors.[6] Whatever reasons initially motivated Congress to enact an exclusion for damages received on account of personal injuries or sickness, a contemporary inquiry must be necessity restrict itself to the language of section 104(a)(2), and administrative and judicial interpretations of that language.

C. *The Nature of a Personal Injury*

As used in section 104(a)(2), the term "personal injuries" has long been understood to include nonphysical injuries as well as physical injuries. See *Bent v. Commissioner,* 87 T.C. 236 (1986), affd. 835 F.2d 67 (3d Cir. 1987) (deprivation of first amendment rights); *Church v. Commissioner,* 80 T.C. 1104, 1106 (1983) (jury award of compensatory damages in a libel suit); *Seay v. Commissioner,* 58 T.C. 32, 38 (1972) (compensation for personal embarrassment and injury to personal reputation). Moreover, courts have long held that injuries resulting from "invidious discrimination," whether on the basis of race, sex, or national origin, are injuries to the individual rights and dignity of the person and, thus, "personal injuries" for purposes of section 104(a)(2). *Burke v. United States,* 929 F.2d 1119, 1121-1122 (6th Cir. 1991), and cases cited therein; *Metzger v. Commissioner,* 88 T.C. 834, 848-849, 858 (1987), affd. without published opinion 845 F.2d 1013 (3d Cir. 1988) (sex and national origin discrimination). As

[6] See Schlenger, "Disability Benefits Under Section 22(b)(5)," 40 Va. L. Rev. 549, 550-552 (1954); Harnett, "Torts and Taxes," 27 N.Y.U. L. Rev. 614, 626-627 (1952); Harrow, "Exemptions under The Revenue Act of 1928," 10 Taxes 161, 163 (1932).

such, the relevant distinction under section 104(a)(2) is between personal and nonpersonal injuries, not between physical and nonphysical injuries. *Roemer v. Commissioner,* 716 F.2d 693, 697 (9th Cir. 1983), revg. 79 T.C. 398 (1982); *Threlkeld v. Commissioner,* 87 T.C. 1294, 1300, 1305 (1986), affd. 848 F.2d 81 (6th Cir. 1988) (compensatory damages received on account of an invasion of the rights that an individual is granted by virtue of being a person in the sight of the law).

D. *Prosecution of a Tort (or at Least a Tort-Type) Claim*

The exclusion in section 104(a)(2) is limited to "damages" received on account of personal injuries or sickness. The requirement for damages has been interpreted as requiring a lawsuit, or at least a settlement in lieu of a lawsuit. In particular, the relevant portion of the Income Tax Regulations, the validity of which neither party challenges, provides: "The term 'damages received (whether by suit or agreement)' means an amount received (other than workmen's compensation) through prosecution of a legal suit or action based upon tort or tort-type rights, or through a settlement agreement entered into in lieu of such prosecution." Sec. 1.104-1(c), Income Tax Regs.

Section 104(a)(2) excludes only damages received upon the prosecution of tort or tort-type claims, not damages received upon the prosecution of economic rights arising of a contract. *Byrne v. Commissioner,* 883 F.2d 211, 215 (3d Cir. 1989), revg. 90 T.C. 1000 (1988); *Metzger v. Commissioner,* 88 T.C. 834, 848-850, 858 (1987), affd. without opinion 845 F.2d 1013 (3d Cir. 1988). Thus, the essential element of the exclusion under section 104(a)(2) is that the damages must derive from some sort of tort or tort-type claim against the payor. *Glynn v. Commissioner,* 76 T.C. 116, 119 (1981), affd. without published opinion 676 F.2d

682 (1st Cir. 1982). The term tort has been defined as "[a] legal wrong committed upon the person or property independent of contract" or "a violation of some duty owing to plaintiff, * * * generally * * * [arising] by operation of law and not by mere agreement of the parties." Black's Law Dictionary, 1489 (6th ed. 1990). See Restatement, Torts 2d, secs. 4 (defining "duty"), 7(1) (defining "injury" as "the invasion of any legally protected interest of another") (1965). The duty, the violation of which gives rise to a tort claim, can arise by statute. See *Byrne v. Commissioner, supra* at 215 (duty not to discriminate in certain situations arising out of the FLSA); *Metzger v. Commissioner, supra* at 845, 848-849 (duty not to discriminate on the basis of sex or national origin arising out of Federal and State statutes).

E. *Settlements*

Section 104(a)(2) contemplates that a lawsuit may be settled by agreement. Here, petitioner received the amount of $120,000 in settlement of his suit alleging that United discriminated against petitioner in violation of the ADEA. Where a settlement agreement exists, determining the exclusion from gross income depends on the *nature* of the claim that was the actual basis for settlement rather than the *validity* of such claim. *Threlkeld v. Commissioner,* 87 T.C. at 1297; *Seay v. Commissioner,* 58 T.C. 32, 37 (1972). In absence of express language stating whether the settlement amount was paid on account of personal injuries (or otherwise), the most important factor in determining any exclusion under section 104(a)(2) is "the intent of the payor" in making the payment. *Metzger v. Commissioner, supra* at 847-848; *Glynn v. Commissioner, supra* at 120.

F. Nature of Consequences of Tort Irrelevant

As suggested above, the inquiry under section 104(a)(2) is whether the nature of the claim giving rise to the payment is tort or tort-like and whether the nature of the injury is personal. *Burke v. United States,* 929 F.2d 1119, 1121, 1123 (6th Cir. 1991). If the above two questions are answered in the affirmative, then our inquiry should end, and the settlement amount received on account of the personal injury is excludable from gross income under section 104(a)(2). *Burke v. United States,* 929 F.2d at 1123; *Threlkeld v. Commissioner,* 87 T.C. at 1299.

Although the direction of the necessary inquiry would seem straightforward, some confusion has arisen in the past when the focus has shifted from the source and character of the injury (a tortious invasion or personal rights) to its consequences. See *Roemer v. Commissioner,* 716 F.2d 693, 696-697, 699 (9th Cir. 1983), revg. 79 T.C. 398 (1982). Those consequences are irrelevant for purposes of the inquiry required by section 104(a)(2). *Burke v. United States,* 929 F.2d at 1123.

In *Roemer v. Commissioner,* 79 T.C. 398 (1982), revd. 716 F.2d 693 (9th Cir. 1983), we were confronted by a jury's award of compensatory damages in a libel suit. We focused on the difference between injury to personal reputation and injury to business or professional reputation. We found that, since the taxpayer had failed to show that the compensatory damages derived from injury to personal reputation, those damages were not excludable under section 104(a)(2) for lack of a personal injury.

On appeal, the U.S. Court of Appeals for the Ninth Circuit held that no distinction between injuries to personal reputation and professional reputation was justified under section 104(a)(2). *Roemer v. Commissioner,* 716 F.2d 693, 697 (9th Cir. 1983), revg. 79 T.C. 398 (1982). The Ninth

Circuit found that, since the tort of defamation was a personal injury action under California law, the compensatory damages were excludable from gross income under section 104(a)(2). 716 F.2d at 700. The Ninth Circuit concluded that the distinction between injury to personal reputation and to professional reputation confused a personal injury (i.e., defamation of an individual) with its derivative consequences (i.e., loss of professional reputation and any resulting loss on income). Id. at 696-697, 699.

In *Bent v. Commissioner,* 87 T.C. 236 (1986), affd. 835 F.2d 67 (3d Cir. 1987), we were confronted by an amount received in settlement of a lawsuit brought by a school teacher against his employer, the local public school board. We found that the school board paid the settlement amount on the decision of the State trial court that the teacher's First Amendment right to freedom of speech had been abridged in violation of 42 U.S.C. section 1983 (section 1983). Id. at 245-246. We concluded that lost earnings should be included in determining the compensatory damages received for violations of section 1983 and held that the entire settlement payment was excludable from gross income under section 104(a)(2). In affirming our decision, the U.S. Court of Appeals for the Third Circuit emphasized that the derivative consequences of a personal injury, such as lost wages, were often the best measure of the extent of the personal injury suffered. *Bent v. Commissioner,* 835 F.2d 67, 70 (3d Cir. 1987), affg. 87 T.C. 236 (1986).

In *Threlkeld v. Commissioner,* 87 T.C. 1294 (1986), affd. 848 F.2d 81 (6th Cir. 1988), we were confronted with facts that required us to reconsider our reasoning in *Roemer v. Commissioner,* 79 T.C. 398 (1982), revd. 716 F.2d 693 (9th Cir. 1983). In *Threlkeld,* we found that an amount specified in an agreement settling a malicious prosecution action as a recovery for injury to the taxpayer's professional reputation was excludable under section 104(a)(2). We held that we would no longer make the distinction we made in *Roemer v. Commissioner, supra,* between damages for injury to personal reputation and those for injury to professional reputation in determining whether damages received in a tort action are excludable from gross income under section 104(a)(2). *Threlkeld v. Commissioner,* 87 T.C. at 1300, 1305. In *Threlkeld v. Commissioner, supra* at 1308, we concluded that:

> [W]e also recognize that focusing upon the nature of the taxpayer's injury instead of the nature of the consequences flowing from that injury will often be difficult. However, this is no more difficult in most cases than the type of inquiry previously required by the line of cases, culminating in *Roemer,* which distinguished the nature of the consequences resulting from a claim.

In affirming our decision, the U.S. Court of Appeals for the Sixth Circuit stated:

> We agree with the Ninth and the Third Circuits that the nonpersonal consequences of a personal injury, such as a loss of future income are often the most persuasive means of proving the extent of the injury that was suffered, and that the personal nature of an injury should not be defined by its effect. Injury to a person's hand or arm is a personal injury. This is so even though it may affect a person's professional pursuits. All income in compensation of that injury is excludable under section 104(a)(2). Similarly, the injury to taxpayer's reputation in this case was a personal injury. This is so even though it affected his professional pursuits. All income in compensation of that injury is excludable under section 104(a)(2).

Threlkeld v. Commissioner, 848 F.2d 81, 84 (6th Cir. 1988), affg. 87 T.C. 1294 (1986).

The above cases explain how the consequences of a personal injury, or the actual damages suffered, do not affect our inquiry under section 104(a)(2). Whether the damages paid to the tort victim reflect a substitute for amounts or items otherwise taxable or a substitute for amounts or items to be enjoyed without a tax consequence is irrelevant. Thus, section 104(a)(2) permits the exclusion of damages that are a substitute for the enjoyment of a whole body or of freedom from distress, such as damages for loss of limb or for pain and suffering. Likewise, the section allows the exclusion of damages that are a substitute for amounts or items that otherwise would be taxable or would potentially produce taxable benefit, such as income lost as a result of a personal injury or amounts reflecting injury to a person's business or professional reputation. *Burke v. United States,* 929 F.2d 1119, 1123 (6th Cir. 1991) (lost wages); *Threlkeld v. Commissioner,* 87 T.C. 1294 (1986), affd. 848 F.2d 81 (6th Cir. 1988) (business or professional reputation). In sum, under section 104(a)(2), we will focus on whether the injury is personal and on whether that claim resulting in payment of damages is tort or tort-like, not on the consequences of the personal injury or the actual damages suffered.

G. *The Inquiry at Hand*

The inquiry at hand concerns the taxability of an amount received in settlement of a suit brought under the ADEA. There is no doubt that a lawsuit was brought under the ADEA and that petitioner received an amount in settlement of such suit. As we have stated, in his suit, petitioner alleged that United violated its duty under the ADEA not to discriminate on the basis of age. Accordingly, we look to the nature of the claim on which the suit was founded. *Metzger v. Commissioner,* 88 T.C. at 847; *Threlkeld v. Commissioner,* 87 T.C. at 1297; *Seay v. Commissioner,* 58 T.C. 32, 37 (1972). We seek to determine whether petitioner's claim under the ADEA sounded in tort and whether the nature of the injury arising from age discrimination is personal for purposes of section 104(a)(2). See *Threlkeld v. Commissioner, supra* at 1299. If we answer those questions in the affirmative, then our inquiry has ended, and the payment petitioner received in settlement of the age discrimination claim is excludable under section 104(a)(2). Id. We need not consider the nature of the consequences of the personal injury (such as whether the victim suffered pain and suffering or was deprived of all or a portion of his livelihood). See id.

Regarding those questions, first, courts have been that discrimination claims are in the nature of tort or tort-type claims. *Byrne v. Commissioner,* 883 F.2d 211, 215 (3d Cir. 1989), revg. 90 T.C. 1000 (1988). More specifically, age discrimination claims brought under the ADEA have been found to be in the nature of tort or tort-type claims. *Pistillo v. Commissioner,* 912 F.2d 145, 149-150 (6th Cir. 1990), revg. T.C. Memo. 1989-329. Second, courts have held also that invidious discrimination, including age discrimination, is a personal injury for the purposes of section 104(a)(2). *Burke v. United States,* 929 F.2d at 1121-1122; *Pistillo v. Commissioner, supra* at 150. We believe that those answers to those questions support exclusion of the whole of the settlement amount received by petitioner under section 104(a)(2), as damages received on account of personal injuries.

Since in the past we have distinguished between nonliquidated and liquidated damages received under the ADEA, we will focus separately on each of the two portions of the settlement amount.

III. *Nonliquidated Damages under the ADEA*

A. *The Receipt in Question*

Simply put, the ADEA prohibits discrimination in employment on the basis of age and accords victims of such discrimination the right to sue for relief. See 29 U.S.C. secs. 621(b), 623(a), 626(b), 626(c), 633. The courts are empowered to grant appropriate legal or equitable relief, including, among other relief, liquidated damages and damages for pecuniary losses. See 29 U.S.C. sec. 626(b). In the complaint petitioner filed against United, petitioner requested, as relief, inter alia, reinstatement, retroactive seniority rights, employee benefits as if petitioner's employment had not been interrupted, and back pay plus interest. The one-half of the settlement amount allocated to nonliquidated damages is not further allocated among the items of requested relief. Since the parties seem to have so assumed, we will assume, without deciding, that the one-half of the settlement amount allocated to nonliquidated damages is fully allocable to back pay or other items that might otherwise be taxable if not received in settlement of a claim under the ADEA.

B. *Positions of the Parties and our Previous Position*

Petitioners argue that the portion of the settlement amount allocable to nonliquidated damages is excludable from gross income under section 104(a)(2) as damages received on account of personal injuries. Respondent counters that such nonliquidated damages were received on account of a wage claim against United and, thus, section 104(a)(2) does not apply, and the receipt is taxable. Although, on similar facts, previously, we have agreed with respondent, we no longer do so. We will explain our reasons below, but we first will review our previous position on the taxability of nonliquidated damages under the ADEA.

In *Rickel v. Commissioner*, 92 T.C. 510 (1989), affd. in part and revd. in part 900 F.2d 655, 661-663 (3d Cir. 1990), we focused on the tax treatment of payments made to the taxpayer pursuant to an agreement settling an ADEA suit. The taxpayer had requested, among other relief, back wages and an equal sum as liquidated damages. We likened the damages received in lieu of wages to damages received in an action for breach of contract and, as such, held them nonexcludable under section 104(a)(2). Id. at 519-521. With regard to the liquidated damages, however, which were measured by that same lost income, we found such measure to be only a substitute for difficult to measure personal injuries resulting from discriminatory employment practices and held such recovery to be excludable under section 104(a)(2). Id. at 521-522.

On appeal, the U.S. Court of Appeals for the Third Circuit partially disagreed with our analysis and partially reversed our decision. *Rickel v. Commissioner*, 900 F.2d 655 (3d Cir. 1990), affg. in part and revg. in part 92 T.C. 510 (1989). The Third Circuit reviewed only our holding that amounts received in lieu of wages under the ADEA were not excludable under section 104(a)(2) and explicitly refused to review our decision that the liquidated damages were excludable. 900 F.2d at 666 n. 18. According to the Third Circuit, after finding that age discrimination was similar to a personal injury and that an ADEA action constituted the assertion of a tort-type right, we should have ended our analysis there and found that all damages, including payment of back wages, flowing from the age discrimination were excludable under section 104(a)(4). Id. at 661. The Third Circuit suggested that "By going further and rummaging through the taxpayer's prayers for relief in order to determine the nature of his claim, [we

were] simply defining the nature of the taxpayer's injury by reference to its nonpersonal consequences" (such as lost wages). Id. at 661-662.

In the Third Circuit's view, the ADEA gives rise to a duty on the part of employers to refrain from discriminating on the basis of age in certain situations. 900 F.2d at 662. The duty to refrain from age discrimination arises by operation of law and does not depend on any contractual relationship. Id. Generally, the Federal employment discrimination statutes were designed to go beyond the "mere employer-employee context, protecting individuals from various forms of discrimination even if they are not yet in a contractual relationship, e.g., refusel to hire contexts." Id. The nonpersonal consequences of discrimination, such as any loss of wages, does not transform discrimination into a nonpersonal injury. Id. at 663. In sum, the Third Circuit held that an ADEA suit was "analogous to the assertion of a tort-type right to redress a personal injury" and that, "just as in the case of a physical personal injury, all the damages received by the taxpayer on account of age discrimination are excludable under section 104(a)(2)." Id. at 663-664.

In *Pistillo v. Commissioner,* 912 F.2d 145 (6th Cir. 1990), revg. T.C. Memo. 1989-329, the issue again was a payment made pursuant to an agreement settling an ADEA lawsuit. The U.S. Court of Appeals for the Sixth Circuit reviewed one of our memorandum decisions, which, like our decision in *Rickel,* held that a payment representing compensatory damages in lieu of back pay was not excludable under section 104(a)(2). Consistent with the Third Circuit in *Rickel,* the Sixth Circuit concluded that an age discrimination lawsuit was analogous to the assertion of a tort-type right to redress personal injuries and found that the entire settlement payment was excludable

under section 104(a)(2). *Pistillo v. Commissioner,* 912 F.2d at 149-150. The Sixth Circuit stated that the taxpayer's "loss of wages—a substantial nonpersonal consequence of his employer's age discrimination—did not transform the discrimination into a nonpersonal injury." Id. at 150. The Sixth Circuit noted that

> Given the result we reach today, Pistillo will have less federal tax liability than if he had not suffered age discrimination in the first place. The reality, however, as opposed to the hypothetical, is that Pistillo did suffer invidious age discrimination. Pistillo endured his employer's indignities, insults and age discrimination; suffered a dignitary tort; and was personally injured. * * * Pistillo is now entitled to receive federal tax treatment *equal* to that received by the typical tort victim who suffers a physical injury and, as a result, receives a settlement award.

Id. at 150 (citations omitted).

C. *We Overrule Our Decisions In Rickel (In Part) and Pistillo*

The decisions of the Third and Sixth Circuits in, respectively, *Rickel* and *Pistillo* are not controlling here under *Golsen v. Commissioner,* 54 T.C. 742, 756-757 (1970), affd. 445 F.2d 985 (10th Cir. 1971), because an appeal would lie to the Seventh Circuit, a circuit that has not yet considered the taxability of nonliquidated damages under the ADEA. Nevertheless, we were free to reject our decisions in *Rickel* and *Pistillo* and to follow the lead of the Third and Sixth Circuits in those cases, if we believe that we have good reason to do so. With that in mind, we have reviewed our decisions and the decisions of the Third and Sixth Circuits in *Rickel* and *Pistillo.* We do not lightly decline to follow our prior decisions; no court bound by

the doctrine of stare decisis does. We believe, however, that the Third and the Sixth Circuits have issued well-reasoned decisions and that, in fact, those appellate decisions, and not our decisions in those cases, are more consistent with our decisions in *Metzger v. Commissioner,* 88 T.C. 834, 845 (1987), affd. without opinion 845 F.2d 1013 (3d Cir. 1988) (sex and natural origin discrimination), and *Threlkeld v. Commissioner,* 87 T.C. 1294, 1297-1301 (1986), affd. 848 F.2d 81 (6th Cir. 1988) (rejecting the bifurcation of defamation into injury to personal reputation and injury to professional reputation). In short, we no longer can distinguish age discrimination from sex discrimination and wages lost due to prohibited discrimination from income lost due to a defamed professional reputation. Therefore, we overrule our conclusion in *Rickel v. Commissioner,* 92 T.C. 510 (1989), and *Pistillo v. Commissioner,* T.C. Memo. 1989-329, that back pay or nonliquidated damages based on back pay received on account of a claim under the ADEA are not excludable under 104(a)(2).

In *Rickel v. Commissioner, supra,* 92 T.C. at 518-520, we relied on *Metzger v. Commissioner, supra, Byrne v. Commissioner,* 90 T.C. 1000 (1988), revd. 883 F.2d 211 (3d Cir. 1989), and *Thompson v. Commissioner,* 89 T.C. 632 (1987), affd. 866 F.2d 709 (4th Cir. 1989). The first case, *Metzger v. Commissioner,* 88 T.C. at 838, 845, 848-850, easily can be distinguished on its facts, because the agreement at issue there settled a breach of contract claim that existed independently of any discrimination claims. The second case, *Byrne v. Commissioner, supra,* was reversed on appeal. Finally, the third case, *Thompson v. Commissioner, supra,* dealt with a claim made under the Equal Pay Act of 1963, not the ADEA.[7] We need not

[7] See Equal Pay Act of 1963, Pub. L. 88-38, sec. 3, 77 Stat. 56-57 (1963) (29 U.S.C. sec. 206(d)).

today decide how we would proceed if we again faced facts similar to those in *Thompson*.

Respondent simply has confused the nature of petitioner's age discrimination claim with the derivative consequences of the personal injury and with the nature of the relief requested by petitioner in his ADEA complaint. Petitioner's claim against United arose *not* because United allegedly breached some contractual obligation to petitioner *but* because United allegedly breached its duty under the ADEA not to discriminate on the basis of age. United's duty under the ADEA not to discriminate does not depend on a contractual relationship with petitioner and includes hiring situations as well as promotion situations. See 29 U.S.C. sec. 623(a)(1). We recognize that petitioner's recovery here of lost wages is similar to a recovery petitioner might have received in settlement of a contract claim. The record, though, contains no evidence that petitioner had any separate contractual claim against United (such as a claim alleging that United breached an employment or collective bargaining contract with petitioner) requesting lost wages as relief; and we have found that petitioner received the amount at issue in settlement of the ADEA claim, not any other claim. Petitioners, thus, were entitled to exclude under section 104(a)(2) the nonliquidated damages received in settlement of the ADEA claim.

IV. *Liquidated Damages Under the ADEA*

A. *The Issue, the Arguments, and Our Conclusion*

We consider next whether section 104(a)(2) permits a taxpayer to exclude from gross income the portion of a payment allocated as liquidated damages in an agreement settling an ADEA civil action.

Petitioner argues that that portion is excudable from gross income as damages received on account of personal injuries. Respondent counters that liquidated damages under the ADEA are equivalent to punitive damages and that section 104(a)(2) does not permit the exclusion of punitive damages. We note that respondent's argument depends initially on the proposition that liquidated damages paid under section 7(b) of the ADEA are paid to the ADEA pliantiff *not* to compensate the plaintiff for anything *but* rather to visit punishment on the defendant. If we find that such liquidated damages are equivalent to punitive damages, then we must either exclude the liquidated damages under *Miller v. Commissioner,* 93 T.C. 330 (1989), revd. 914 F.2d 586 (4th Cir. 1990), or overrule our decision in *Miller,* as this case is not appealable to the Fourth Circuit. See *Golsen v. Commissioner,* 54 T.C. 742, 756-757 (1970), affd. 445 F.2d 985 (10th Cir. 1971).

We conclude, however, that liquidated damages under the ADEA in the hands of the victim are intended to compensate the victim of age discrimination for certain nonpecuniary losses and, thus, are excludable from gross income under section 104(a)(2). *Rickel v. Commissioner,* 92 T.C. 510, 521-522 (1989), revd. on other grounds 900 F.2d 655 (3d Cir. 1990). We need not consider in this case whether we should follow our decision or the decision of the Fourth Circuit in *Miller v. Commissioner, supra,* relating to whether punitive damages that serve no compensatory function are excludable under section 104(a)(2). Instead, we focus on the purpose under the ADEA of awarding liquidated damages to victims of age discrimination and, thus, on the compensatory nature of liquidated damages awarded under the ADEA.

B. ***Punitive Versus Compensatory Damages***

Generally, punitive damages paid in a civil action based

on tort are designed to punish the tortfeasor for the wrongful act and to deter the tortfeasor and others from similar acts in the future. Restatement, Torts 2d, secs. 901 (comment 1-c), 908 (1979). The purposes of punitive damages are similar to those of fines in criminal law—namely, punishment and deterrence. In contrast to punitive damages, compensatory damages "are designed to place [the tort victim] in a position substantially equivalent in a pecuniary way to that which [the victim] would have occupied had no tort been committed." Restatement, *supra,* sec. 903 (comment a). Compensatory damages can include compensation for both nonpecuniary harms such as bodily harm, illness, physical pain, emotional distress, humiliation, and pain and suffering as well as pecuniary harms such as property damage and loss of past and prospective wages. Id. at secs. 903-906.

We recognize that the Supreme Court has stated that ADEA's legislative history "indicates that Congress intended for liquidated damages to be punitive in nature." *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 125 (1985). Respondent argues that this description suggests that liquidated damages under the ADEA are the equivalent of punitive damages and, thus, are not excludable under section 104(a)(2). We rejected that argument in *Rickel v. Commissioner,* 92 T.C. at 521-522, and we again reject that argument. As we suggested in *Rickel v. Commissioner, supra* at 521, the Supreme Court in *Thurston* viewed liquidated damages as an effective deterrent to willful violations of the ADEA and was deciding the extent to which the employer's culpability affected liquidated damages. *Trans World Airlines, Inc. v. Thurston, supra* at 125-129. We do not believe the Supreme Court to have concluded that, from the recipient's perspective, receipt of liquidated damages under the ADEA represent anything other than compensa-

tion for those losses that are hard to calculate. See *Powers v. Grinnell Corp.*, 915 F.2d 34, 41 (1st Cir. 1990) ("We believe that the revisionist view reads far too much into the one sentence in *Thurston* upon which it relies."); *Linn v. Andover Newton Theological School, Inc.*, 874 F.2d 1, 7 n. 9 (1st Cir. 1989).

We find support for our view of *Thurston* in the conclusion of several courts that liquidated damages serve both a compensatory and a deterrent or punitive function. In *Rickel v. Commissioner*, 92 T.C. at 521, this Court noted that liquidated damages under the ADEA serve both a compensatory and a deterrent function. Several appellate courts also have recognized that such liquidated damages serve a compensatory and a deterrent function. See *Powers v. Grinnell Corp., supra* at 41-43; *Gilmer v. Insterstate/Johnson Lane Corp.*, 895 F.2d 195, 200 (4th Cir. 1990); *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1205 (7th Cir. 1989) ("[W]hile liquidated damages serve a deterrent or punitive function, Congress also intended liquidated damages to serve as compensation for a discharged employee's nonpecuniary losses arising from the employer's willful misconduct"); *Blum v. Witco Chemical Corp.*, 829 F.2d 367, 382 (3d Cir. 1987) ("We agree that one purpose of a liquidated damage award is to compensate the plaintiff for the delay in receiving back pay and benefits. However, liquidated damages are also punitive in nature, intended to deter future violations.").

In addition, as we have discussed, the ADEA was modeled in part on the Fair Labor Standards Act of 1938, as amended (the FLSA). See, e.g., 29 U.S.C. sec. 626(b) (ADEA provision incorporating 29 U.S.C. secs. 211(b), 216(b), 216(c) and 217). Regarding the ADEA, the Supreme Court has stated that, "where * * * Congress adopts a new law incorporating sections of a prior law,

Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons,* 434 U.S. 575, 581 (1978). We note that liquidated damages under the FLSA have long been viewed as compensation for "damages too obscure and difficult of proof for estimate other than by liquidated damages." *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 707 (1945); *Overnight Motor Transportation Co. v. Missel,* 316 U.S. 572, 583-584 (1942). We have found under both the ADEA and the FLSA that, from the victims' perspective, receipt of liquidated damages compensates victims for those difficult to measure nonpecuniary losses that are the consequence of the personal injury. *Rickel v. Commissioner, supra,* 92 T.C. at 521.

Finally, the legislative history of the Age Discrimination in Employment Act Amendments of 1978, Pub. L. 95-256, 92 Stat. 189 (1978), supports the conclusion that, from the recipient's perspective, liquidated damages under the ADEA are intended to compensate the recipient for certain nonpecuniary losses. The Conference Report states that "The ADEA as amended by this act does not provide remedies of a punitive nature." H. Rept. 95-950, (Conf.) at 14 (1978) reprinted in 1978 U.S. Code Cong. & Admin. News 528, 535. The Report states also that

> Under section 7(b), which incorporates the remedial scheme of sections 11(b), 16 and 17 of the FLSA, 'amounts owing' contemplates two elements: First, it includes items of pecuniary or economic loss such as wages, fringe, and other job-related benefits. Second, it includes liquidated damages (calculated as an amount equal to the pecuniary loss) which compensate the aggrieved party for nonpecuniary losses arising out of a willful violation of the ADEA.

H. Rept. 95-950, *supra* at 13. See *Pfeiffer v. Essex Wire Corp.*, 682 F.2d 684, 687 (7th Cir. 1982).

C. *Conclusion*

In sum, we conclude that, from the victim's perspective, receipt of liquidated damages under the ADEA compensates the victim of age discrimination for certain nonpecuniary losses. *Rickel v. Commissioner,* 92 T.C. at 521-522. We find that such liquidated damages are excludable under section 104(a)(2). Id. We, thus, hold that petitioners are entitled under section 104(a)(2) to exclude from gross income both the nonliquidated and the liquidated damages received in settlement of the ADEA claim.

Decision will be entered under Rule 155.

Reviewed by the Court.

CHABOT, KÖRNER, SWIFT, GERBER, WRIGHT, PARR, RUWE, WHALEN, COLVIN, and BEGHE, *JJ.*, agree with the majority opinion.

HAMBLEN, *J.*, did not participate in the consideration of this opinion.

COHEN, *J.*, concurring in part and dissenting in part: I agree with the majority opinion insofar as it holds that the amount received by petitioner as liquidated damages is excludable from taxable income under section 104(a)(2). I dissent, however, insofar as the majority holds that section 104(a)(2) also excludes from taxation amounts designated wages or back pay in the ADEA, in petitioner's complaint against his employer, in the settlement documents, on petitioner's tax return, and in the petition prior to amendment. The majority's use of the term "nonliquidated damages" (an anomalous term when applied to amounts actually calculated by reference to a wage schedule) is an understandable attempt to disregard labels in redetermining the substantive nature of the award. I submit, however, that the label given to these amounts by the Congress, by the employer, by the employee, and by this Court in prior opinions describes the substance of the payment and should result in taxability. Among other things, the majority disregards previously settled law that the intent of the payor as to the purpose in making the payment must be examined. See *Knuckles v. Commissioner,* 349 F.2d 610 (10th Cir. 1965), affg. a Memorandum Opinion of this Court; *Metzger v. Commissioner,* 88 T.C. 834, 847848 (1987), affd. without published opinion 845 F.2d 1013 (3d Cir. 1988); *Fono v. Commissioner,* 79 T.C. 680, 694 (1982), affd. without published opinion 749 F.2d 37 (9th Cir. 1984).

In *Rickel v. Commissioner,* 92 T.C. 510 (1989), affd. in part and revd. in part 900 F.2d 655 (3d Cir. 1990), we focused our attention on the characterization of the liquidated damages awarded under the ADEA, noting that "This court and others have consistently held that amounts received in lieu of wages, salary, or lost profits are includable in income." 92 T.C. at 518. Although the char-

acterization of the ADEA claim was one of first impression, we found the situation analogous to claims of sex discrimination in *Metzger v. Commissioner,* 88 T.C. 834, 851-852 (1987), affd. without published opinion 845 F.2d 1013 (3d Cir. 1988); *Thompson v. Commissioner,* 89 T.C. 632, 649-650 (1987), affd. 866 F.2d 709 (4th Cir. 1989); and *Byrne v. Commissioner,* 90 T.C. 1000, 1010-1011 (1988), revd. and remanded 883 F.2d 211 (3d Cir. 1989).

In *Rickel,* as here, respondent argued that the ADEA creates a contract action, not a tort action, and that the liquidated damages are punitive in nature and therefore taxable. Respondent relied on *Rogers v. Exxon Research & Engineering Co.,* 550 F.2d 834, 838 (3d Cir. 1977), where the Court of Appeals for the Third Circuit had characterized ADEA actions and stated that "A suit for damages consisting of back wages arising out of the breach of an employment agreement is a routine contract action where the parties would be entitled to a jury under the Seventh Amendment." Rejecting respondent's contention, we stated:

> The holding of * * * [*Rogers*] neither establishes exclusivity of the contract claim nor negates a tort remedy under the ADEA. Like the FLSA and the Equal Pay Act, the ADEA contains elements of both contract and tort claims. Specifically, while damages in lieu of wages are in the nature of a breach of contract action, liquidated damages are intended as compensation for a tort or tort-like injury. [92 T.C. at 520-521.]

Our conclusion concerning the dual nature of the claims settled was consistent with the analysis and conclusions in our prior opinions in *Thompson v. Commissioner,* 89 T.C. at 646-647, and *Byrne v. Commissioner,* 90 T.C. at 1008-1010.

In *Byrne v. Commissioner,* 883 F.2d 211 (3d Cir. 1989), revg. and remanding 90 T.C. 1000 (1988), and in *Rickel v. Commissioner,* 900 F.2d 655 (3d Cir. 1990), affg. in part and revg. in part 92 T.C. 510 (1989), the Court of Appeals for the Third Circuit rejected our approach of bifurcating the types of claims under the FLSA and ADEA and allocating the wage claims to a contract action and the liquidated damages to a tort action. The Court of Appeals in *Rickel v. Commissioner, supra,* cited various cases categorizing race discrimination in the workplace as a tort claim for personal injuries. The Court of Appeals for the Third Circuit held that all the damages received by the taxpayer on account of age discrimination are excludable under section 104(a)(2), acknowledging:

> Of course, it might be troubling to some that a successful plaintiff in an ADEA suit will make out better, vis-a-vis federal income tax liability, than if the plaintiff had not been discriminated against in the first place. Although this concern is understandable, we note that we are simply following the Treasury regulation that injects into the analysis tort and contract concepts. Moreover, the successful ADEA plaintain is being treated no better (or worse now) than the typical tort victim who suffers a physical injury. * * * [900 F.2d at 664.]

In *Pistillo v. Commissioner,* 912 F.2d 145 (6th Cir. 1990), revg. and remanding T.C. Memo. 1989-329, and in *Burke v. United States,* 929 F.2d 1119 (6th Cir. 1991), the Court of Appeals for the Sixth Circuit followed a similar analysis and reached the same result in cases involving age discrimination and sex discrimination, respectively.

The Court of Appeals for the Third Circuit in *Rickel* and the Court of Appeals for the Sixth Circuit in *Burke* suggested that our opinion abandoned the line of cases

that had held that all consequences of personal injury, whether economic or physical, are excludable from taxable income under section 104(a)(2). See *Roemer v. Commissioner,* 716 F.2d 693, 697 (9th Cir. 1983), revg. 79 T.C. 398 (1982); *Miller v. Commissioner,* 93 T.C. 330 (1989), revd. and remanded 914 F.2d 586 (4th Cir. 1990); *Metzger v. Commissioner,* 88 T.C. 834 (1987), affd. without published opinion 845 F.2d 1013 (3d Cir. 1988); *Threlkeld v. Commissioner,* 87 T.C. 1294 (1986), affd. 848 F.2d 81 (6th Cir. 1988); *Bent v. Commissioner,* 87 T.C. 236 (1986), affd. 835 F.2d 67 (3d Cir. 1987). The disputed payments in these cases, however, did not arise from settlement of claims that could be characterized as contractual. *Roemer, Threlkeld,* and *Miller* involved damages for defamation made against third-party tort-feasors, not against the taxpayer's employer. *Bent* involved infringement of the taxpayer's First Amendment freedoms by refusal to rehire him. His contract claims had been expressly rejected by the State court prior to the settlement payment in issue. See the dissenting opinion of Judge Wellford in *Burke v. United States,* 929 F.2d at 1123.

In *Metzger,* the taxpayer received payment in settlement of her claim of violation of her rights to be free from discrimination on account of sex and national origin. We stated:

> excludability depends on what was the injury complained of, and the loss of income may merely be "an evidentiary factor" (*Bent*) or "the best measure of loss" (*Threlkeld*). * * * in the instant case (1) the evidence is clear that no effort was made to calculate an amount of back pay, (2) the evidence is clear that the college and petitioner sought to settle all the claims for a single lump sum, (3) the college believed that petitioner's contract claim might result in a liability of

> $15-20,000, and (4) most of petitioners' claims were tort or tort-type claims on account of personal injuries and were not for back pay * * *. [88 T.C. at 858.]

In *Metzger,* the taxpayer had not claimed that more than half of the damages received was for tort claims. See the dissenting opinion of Judge Wellford in *Burke v. United States,* 929 F.2d at 1123.

In *Byrne v. Commissioner,* 90 T.C. 1000, 1011 (1988), revd. and remanded 883 F.2d 211 (3d Cir. 1989), and in *Thompson v. Commissioner,* 89 T.C. 632, 649-650 (1987), affd. 866 F.2d 709 (4th Cir. 1989), equal amounts were allocated by this Court to tort claims and contract claims based on the evidence in those cases. The Court of Appeals in *Rickel* stated:

> Neither in *Byrne* nor the instant case had the taxpayer performed uncompensated services for the employer after the challenged discrimination. On the contrary, both taxpayers were seeking compensation for *their inability to earn an income* due to the tortious action of their employers. Thus, our decision today does not conflict with *Thompson.* Of course, we do not decide whether we would adopt the reasoning of *Thompson* given a similar factual scenario. [900 F.2d at 664-665 n.16; emphasis in original.]

This statement was made in response to a suggestion by the Government that the Third Circuit opinion in *Byrne* was inconsistent with the Fourth Circuit opinion in *Thompson.*

In summary, the difference between prior opinions of this Court, on the one hand, and the Courts of Appeals for the Third and Sixth Circuits, on the other, is whether the plaintiff's statutory right in an ADEA lawsuit com-

prises both contract and tort claims or whether all of the plaintiff's recovery is "on account of" personal injury.

In this case as in its predecessors, we are dealing with statutory rights and remedies that may find analogies in State tort or contract law. Regardless of the labels, however, the tax consequences should be determined by substance. As stated by the majority in this case, "petitioner sought in his complaint, inter alia, reinstatement, retroactive seniority rights, employee benefits as if petitioner's employment had not been interrupted, back pay plus interest, and liquidated damages." Petitioner's employer had contracted to pay wages to petitioner at a specified rate during the period of petitioner's employment. Historically, employees have been entitled to back wages when employment is wrongfully terminated. The ADEA establishes age discrimination as a wrongful cause of termination. Thus, the employer's interruption of petitioner's employment was unlawful, and the obligation to pay wages continued. The portion of the award labeled back wages is in substance back wages, i.e., it is replacement of lost income, not compensation for personal injury. Thus, it is distinguishable from amounts received from third-party tort-feasors or because of the wrongful conduct of the employer.

With respect to the liquidated damages portion, in *Rickel v. Commissioner,* 92 T.C. at 521-522, we held that liquidated damages in the hands of the taxpayer were compensatory, notwithstanding language in *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 125 (1985), that "The legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature." Other cases have characterized liquidated damages under the ADEA as punitive damages intended to deter conduct of an employer. *Gilchrist v. Jim Slemons Imports, Inc.,* 803 F.2d 1488, 1494 (9th Cir. 1986); *Kelly*

v. American Standard, Inc., 640 F.2d 974, 979 (9th Cir. 1981). Yet the majority has no trouble characterizing the liquidated damages portion of the award to petitioner as compensatory in the hands of the taxpayer and not treated as punitive damages for tax purposes because of language taken out of the context of other cases. I agree with this approach. I believe that we should follow it also with respect to the back wages rather than merely applying the language of other cases ascribing the ADEA action as involving tort-type rights.

In a footnote in our opinion in *Byrne v. Commissioner,* 90 T.C. 1000, 1011 n.10 (1988), revd. and remanded 883 F.2d 211 (3d Cir. 1989), we remarked:

> Petitioner, relying on *Roemer v. Commissioner,* 716 F.2d 693, 696 (9th Cir. 1983), revg. 79 T.C. 398 (1982), argues that once she has shown the existence of tort claims, she is not required to present evidence going to an allocation of the damages between tort and contract claims. Her reliance on *Roemer* is misplaced. *Roemer* recognized that when the claim at the root of a damage award was a tort claim, the amount of damages would be measured in part by lost wages, but that the tort award should not be treated as income to the extent it was so measured. This Court has followed that principle. See *Metzger v. Commissioner,* 88 T.C. at 857-858; *Bent v. Commissioner,* 87 T.C. at 250; *Threlkeld v. Commissioner,* 87 T.C. 1294, 1299 (1986). However, the situation here does not fall within the *Roemer* principle cited by petitioner. Here, we have been unable to find that the claims settled were solely claims of a tort-like nature. Since both personal injury claims and other claims are settled by the release, the burden is on petitioner to present evidence to allocate the settlement payment between includable and excludable amounts.

Neither *Rickel v. Commissioner,* 92 T.C. 510 (1989), affd. in part and revd. in part 900 F.2d 655 (3d Cir. 1990), nor this case presents difficulty in allocation. Here, the parties expressly agreed that 50 percent of the payment received was for back pay, the employer withheld taxes on that amount, and petitioners originally reported that amount as taxable income on their return. The stipulated facts establish that the employer and the employee each regarded only the amount received as liquidated damages excludable under section 104.

In *Rickel v. Commissioner, supra,* the Court of Appeals for the Third Circuit's own prior characterization of an action for back wages as "a routine contract action" was dismissed in a footnote as follows:

> We do not believe that *Rogers v. Exxon Research & Eng'g Co.,* 550 F.2d 834 (3d Cir. 1977), *cert. denied,* 434 U.S. 1022 (1978), compels a different conclusion. First, the *Rogers* court was characterizing an ADEA action for purposes of determining whether an ADEA plaintiff had the right to a jury trial under the Act, not for tax purposes. *Id.* at 838-39. Second, the conclusion by the *Rogers* court that an ADEA action is a "routine contract action" was gratuitous given that the holding was simply that an ADEA action involves rights and remedies of the sort typically enforced in an action at law. *Id.* And, third, we do not hold today that there are no elements in an ADEA action that do not possess contract type features, only that age discrimination, for purposes of sec. 104(a)(2) of the IRC, is a personal injury and an ADEA action to redress that injury is more like the assertion of a tort type right. [*Rickel v. Commissioner,* 900 F.2d at 663 n.13.]

I respectfully suggest that this rationale does not justify allocation of 100 percent of the ADEA award to a personal injury.

NIMS, PARKER, CLAPP, JACOBS, and WELLS, *JJ.*, agree with this opinion.

APPENDIX B

UNITED STATES TAX COURT

100 T.C. No. 40
Docket No. 11120-89

BURNS P. DOWNEY AND MARJORIE DOWNEY, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT*

Filed June 29, 1993

P, an airline pilot, sued his former employer under the Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. 90-202, 81 Stat. 602 (current version at 29 U.S.C. secs. 621-634 (1988)), claiming that certain actions of his employer constituted unlawful age discrimination in violation of the ADEA and that such actions were a willful violation of the ADEA. P received the amount of $120,000 in settlement of his ADEA claim. One-half of the settlement of his ADEA claim. One-half of the settlement amount was allocated to "nonliquidated damages", and one-half to "liquidated damages". In *Downey v. Commissioner*, 97 T.C. 150 (1991), we held that both the "liquidated damages" and the "nonliquidated damages" received by P, pursuant to the settlement of his ADEA suit, were excludable under sec. 104(a)(2), I.R.C. Respondent asks us to reconsider our holding in light of the Supreme Court's opinion in *United States v. Burke*, 504 U.S. ____, 112 S. Ct. 1867 (1992).

* This opinion supplements our previous opinion, 97 T.C. 150 (1991).

Held: Upon reconsideration, we adhere to our original holding that all damages which petitioner received on account of his ADEA claim are excludable.

Steven E. Reick, for petitioners.

Marjorie A. Gilbert, James F. Hanley, Jr., and *Jan E. Lamartine*, for respondent.

SUPPLEMENTAL OPINION

RUWE, *Judge*: This case is before the Court on respondent's motion to reconsider our opinion in *Downey v. Commissioner*, 97 T.C. 150 (1991), in light of the Supreme Court's decision in *United States v. Burke*, 504 U.S. ____, 112 S. Ct. 1867 (1992). In our previous opinion, we held that the entire amount received by petitioner Burns P. Downey in settlement of a suit brought under the Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. 90-202, 81 Stat. 602 (current version at 29 U.S.C. secs. 621-634 (1988)), was excludable under section 104(a)(2).[1]

The issue in *United States v. Burke, supra*, was whether an award of backpay based on a sex discrimination claim under title VII was excludable under section 104(a)(2). The Supreme Court held that only damages received on account of a claim that redresses a tort-like personal injury are excludable under section 104(a)(2). *Id.* at ____, 112 S. Ct. at 1872. The mere fact that discrimination caused harm to its victim does not mean that it was a tort-like personal injury for purposes of section 104(a)(2).

It is beyond question that discrimination in employment on the basis of sex, race, or any of the other

[1] Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the year in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

> classifications protected by Title VII is, as respondents argue and this Court consistently has held, an invidious practice that causes grave harm to its victims. The fact that employment discrimination causes harm to individuals does not automatically imply, however, that there exists a tort-like "personal injury" for purposes of federal income tax law. [*Id.* at ____, 112 S. Ct. at 1872-1873; citations omitted.]

With respect to whether a sex discrimination claim under title VII was a tort-like personal injury claim, the Supreme Court stated:

> No doubt discrimination could constitute a "personal injury" for purposes of § 104(a)(2) *if* the relevant cause of action evidenced a tort-like conception of injury and remedy. * * * [*Id.* at ____, 112 S. Ct. at 1873; emphasis added.]

The Supreme Court found that one of the hallmarks of traditional tort liability was the availability of a broad range of damages to compensate the victim. These included damages for intangible elements of injury that were not pecuniary in their immediate consequences. The Court also found that punitive or exemplary damages are generally available in tort actions where the defendant's conduct was intentional or reckless. *Id.* at ____, 112 S. Ct. at 1871, 1872. In deciding whether a title VII claim evidenced a tort-like conception of injury and remedy, the Supreme Court focused on the remedies "available" under the statutory provisions of title VII. *Id.* at ____, 112 S. Ct. at 1871-1874.[2] The Supreme Court found that

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[2] Justice O'Connor's dissent criticized the majority for focusing on the available statutory remedies. The majority provided the following response:

> The dissent nonetheless contends that we "misapprehen[d] the nature of the inquiry required by sec. 104(a)(2) and the IRS regulation" by "[f]ocusing on [the] remedies" available under Title VII. * * * As discussed above, however, the concept of a "tort" is inextricably bound up with remedies—specifically damages actions. Thus, we believe that consideration of the remedies available under Title VII is critical in determining the "nature of the statute" and the "type of claim" brought by respondents for purposes of sec. 104(a)(2). * * * [*United States v. Burke,* 504 U.S. ____, ____, 112 S. Ct. 1867, 1872 n.7 (1992); citations omitted.]

> in contrast to the tort remedies for physical and nonphysical injuries discussed above, Title VII does not allow awards for compensatory or punitive damages; instead, it limits available remedies to backpay, injunctions, and other equitable relief. * * * [*Id.* at ____, 112 S. Ct. at 1873.[3]]

Because of the limited remedy provided by title VII, the Supreme Court concluded:

> Thus, we cannot say that a statute such as Title VII, whose sole remedial focus is the award of backwages, redresses a tort-like personal injury within the meaning of sec. 104(a)(2) and the applicable regulations. [*Id.* at ____, 112 S. Ct. at 1874; fn. refs. omitted.[4]]

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[3] The Supreme Court made the following comparisons:

> Indeed, the circumscribed remedies available under Title VII stand in marked contrast not only to those available under traditional tort law, but under other federal antidiscrimination statutes, as well. For example, 42 U.S.C. sec. 1981 permits victims of race-based employment discrimination to obtain a jury trial at which "both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages may be awarded." The Court similarly has observed that Title VIII of the Civil Rights Act of 1968, whose fair housing provisions allow for jury trials and for awards of compensatory and punitive damages, "sounds basically in tort" and "contrasts sharply" with the relief available under Title VII. [*Id.* at ____, 112 S. Ct. at 1873-1874; citations and fn. ref. omitted.]

[4] Subsequent to the title VII claim at issue in *United States v. Burke, supra,* title VII was amended to allow recovery of future

The issue we must decide is whether Mr. Downey's discrimination claim under the ADEA constitutes a tort-like personal injury claim for purposes of section 104(a)(2). If the answer is yes, any damages received on account of that claim are excludable. *Horton v. Commissioner,* 100 T.C. ____, ____ (1993) (slip op. at 7).

In contrast to title VII, the ADEA offers a range of remedies, including both unpaid wages and "liquidated damages". Liquidated damages under the ADEA have been held to "serve both a compensatory and a deterrent or punitive function." *Downey v. Commissioner, supra* at 172; *Rickel v. Commissioner,* 92 T.C. 510, 521 (1989), revd. on other grounds 900 F.2d 655 (3d Cir. 1990). "Liquidated damages" under the ADEA serve to compensate the victim of age discrimination for certain nonpecuniary losses. *Downey v. Commissioner, supra* at 170. This is a remedy traditionally associated with tort claims. *United States v. Burke,* 504 U.S. at ____, 112 S. Ct. at 1873. The fact that "liquidated damages" also serve a deterrent or punitive purpose further supports the conclusion that a claim under the ADEA is tort-like. Indeed, the Supreme Court in *Burke* noted that punitive or exemplary damages are generally available in tort actions where the defendant's misconduct was intentional or reckless. *Id.* at ____, 112 S. Ct. at 1871,

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pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, as well as punitive damages. See Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1073. With respect to this amendment, the Supreme Court stated:

> we believe that Congress' decision to permit jury trials and compensatory and punitive damages under the amended act signals a marked change in its conception of the injury redressable by Title VII * * * [*United States v. Burke,* 504 U.S. at ____, 112 S. Ct. at 1874 n.12.

1872;[5] see *Horton v. Commissioner, supra* (holding punitive damages received on account of personal injury excludable under section 104(a)(2)).

We hold that the ADEA compensation scheme evidences a tort-like conception of injury and remedy. It follows that discrimination under the ADEA constitutes a tort-like personal injury for purposes of section 104(a)(2), and all damages received by Mr. Downey on account of his ADEA claim are excludable from income. See *Horton v. Commissioner, supra.* We therefore reaffirm our original holding in this case.

Decision will be entered under Rule 155.

Reviewed by the Court.

HAMBLEN, PARKER, SHIELDS, CLAPP, SWIFT, GERBER, PARR, WELLS, COLVIN, and CHIECHI, *JJ.*, agree with the majority.

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[5] A claimant under the Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. 90-202, 81 Stat. 602 (current version at 29 U.S.C. secs. 621-634 (1988)), also has the right, like ordinary tort plaintiffs, to a jury trial "of any issue of fact." 29 U.S.C. sec. 626(c)(2). By contrast, the Supreme Court noted in *Burke* that

> the Courts of Appeals have held that Title VII plaintiffs, *unlike ordinary tort plaintiffs,* are not entitled to a jury trial. * * * [*United States v. Burke,* 504 U.S. at ____, 112 S. Ct. at 1872; emphasis added.]

COHEN, *J.*, concurring in the result: I dissented in *Downey v. Commissioner,* 97 T.C. 150, 174 (1991) (Downey I), and I continue to believe that the result reached by the majority in that opinion is wrong. I would hold in this case that only the liquidated damages were received on account of the tort of willful discrimination and that the back wages were received on account of nontortious breach of the implied terms of the taxpayer's employment. See Downey I, 97 T.C. at 177-178 (Cohen, J., concurring in part and dissenting in part).

I do not believe that *United States v. Burke,* 504 U.S. ____, 112 S. Ct. 1867 (1992), supports the result reached by the majority. The majority opinion refers to a "range of remedies, including both unpaid wages and 'liquidated damages'." Majority op. p. 5. Two categories of statutory remedies do not strike me as constituting a range. In actions brought under the Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. 90-202, 81 Stat. 602 (current version at 29 U.S.C. secs. 621-634 (1988)), the Courts of Appeals have unanimously denied damages for pain and suffering and emotional distress—typical tort remedies. See, e.g., *Wilson v. Monarch Paper Co.,* 939 F.2d 1138, 1144 (5th Cir. 1991); *Haskell v. Kaman Corp.,* 743 F.2d 113, 120-121 n.2 (2d Cir. 1984), and cases cited therein. Moreover, under *Burke,* if a plaintiff alleging wrongful termination of employment is only entitled to back wages, that award is taxable. Under this case, if such a plaintiff either proves willfulness or by settlement receives twice the amount of back wages, none of the award is taxable. The Supreme Court in *Burke* held that an award of back wages was taxable; nothing in that opinion states that adding liquidated damages to such an award makes the total nontaxable. Without a clearer indication from the Supreme Court, I cannot agree that this anomalous result is correct.

I concur here, however, because I believe that *United States v. Burke, supra,* does not provide a clear-cut reason for changing the result in Downey I, and all presently extant authorities dealing specifically with ADEA claims support petitioners' position. See *Redfield v. Insurance Company of North America,* 940 F.2d 542 (9th Cir. 1991); *Pistillo v. Commissioner,* 912 F.2d 145 (6th Cir. 1990), revg. T.C. Memo. 1989-329; *Rickel v. Commissioner,* 92 T.C. 510 (1989), affd. in part and revd. in part 900 F.2d 655 (3d Cir. 1990).

HALPERN, *J.*, concurring: The issue is whether petitioner Burns P. Downey's claim under the Age Discrimination in Employment Act of 1967 (ADEA) Pub. L. 90-202, 81 Stat. 602 (current version at 29 U.S.C. secs. 621-634 (1988)), was for a "tort-like personal injury", for purposes of section 104(a)(2). The majority answers that question in the affirmative and I agree. The majority goes much further, however, opining that *all* claims under the ADEA meet that standard, including claims that, in my view, are dissimilar to Mr. Downey's in pertinent respects. I believe the majority's rationale to be overbroad and therefore respectfully cannot join.

Section 104(a)(2) excludes from gross income "damages received * * * on account of personal injuries or sickness". In order for a receipt to be excluded from gross income by section 104(a)(2), the following requirements must be satisfied: (1) The receipt must constitute "damages", meaning an amount obtained through an action or settlement based on tort or *tort type* rights, sec. 1.104-1(c), Income Tax Regs.; (2) there must be a *personal injury*; and (3) the damages must have been received *on account of* such personal injury. The Supreme Court, in *United States v. Burke*, 504 U.S. ____, 112 S. Ct. 1867 (1992), created a convenient shorthand for these requirements, stating that, to be excludable under section 104(a)(2), an amount must have been received on account of a "tort-like personal injury".

The Supreme Court held that, in determining whether an injury is tortlike, we must consider the remedies available under the cause of action at issue.

> No doubt discrimination could constitute a "personal injury" for purposes of § 104(a)(2) if the relevant cause of action evidenced a tort-like conception of injury and remedy. * * * [*Id.* at ____, 112 S. Ct. at 1873.]

With respect to whether a cause of action evidences a tortlike conception of injury and remedy, the majority properly observes that "one of the hallmarks of traditional tort liability was the availability of a broad range of damages to compensate the victim." Majority op. p. 3. Accordingly, the majority inquires whether the remedies available to Mr. Downey under the ADEA were sufficiently broad to render his injury "tort-like," as that term is used in *Burke*. The majority holds that they were, primarily on the ground that the liquidated damages received by Mr. Downey under the ADEA served to compensate him for his nonpecuniary losses, and also because such liquidated damages serve a deterrent or punitive purpose. Majority op. pp. 5-6. I agree. The majority apparently further concludes that, *in all instances*, the remedies available under the ADEA are sufficiently broad as to evidence "a tort-like conception of injury and remedy" and that, therefore, *in all instances* "discrimination under the ADEA constitutes a tort-like personal injury". Majority op. pp. 6-7. Those latter conclusions are the key points on which I disagree with the majority.

I. *Remedies Available Under the ADEA*

The majority states that "In contrast to title VII, the ADEA offers a range of remedies, including both unpaid wages and 'liquidated damages'." Majority op. p. 5. That assertion, however, is overbroad. ADEA section 7(b) provides that a prevailing plaintiff is entitled to liquidated damages "*only* in cases of *willful* violations". 29 U.S.C. sec. 626(b) (emphasis added). Accordingly, any victim of *non*willful age discrimination bringing a claim under the ADEA does *not* have available to him the remedy of

liquidated damages.[1] In fact, the only remedy available to such victim would be a claim for unpaid wages, which remedy has been insufficient to render an injury "tort-like". *United States v. Burke, supra.*

II. ***Analysis***

As noted, liquidated damages under the ADEA are unavailable whenever willfulness is not proved. The majority opinion, in my view, is unsatisfactory because it fails to consider the significance of that observation. I believe the significance of that observation to be that the ADEA implicitly creates *two mutually exclusive causes of action*: One for willful discrimination, and one for nonwillful discrimination. A cause of action for willful discrimination, permitting the recovery of liquidated damages, would evidence a tortlike conception of injury and remedy for the reasons given by the majority. A cause of action for nonwillful discrimination, however, would not—because it would, in relevant respects, be indistinguishable from title VII (neither allows any remedy other than the recovery of unpaid wages).

It might be argued that, were we to distinguish between claims for willful and nonwillful discrimination, we would

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[1] The Supreme Court recently has had occasion to deal with the Age Discrimination in Employment Act of 1967 (ADEA), Pub. l. 90-202, 81 Stat. 602 (current version at 29 U.S.C. secs. 621-634 (1988)). *Hazen Paper Co. Biggins*, __ U.S. __, 113 S. Ct. 1701 (1993). One issue dealt with was the meaning of the term "willful" in ADEA sec. 7(b). By way of introduction to its discussion of that issue, the Court recapitulated what it had said in an earlier case (*Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985)) concerning the structure of the ADEA: "Congress aimed to create a 'two-tiered liability scheme', under which some but not all ADEA violations would give rise to liquidated damages." *Hazen Paper Co. v. Biggins*, __ U.S. __, 113 S. Ct. at 1708.

be " 'rummaging through the taxpayer's prayers for relief in order to determine the nature of his claim' ", thereby attempting to " 'simply [define] the nature of the taxpayer's injury by reference to its nonpersonal consequences' such as lost wages)." *Downey v. Commissioner*, 97 T.C. 150, 167 (1991) (quoting *Rickel v. Commissioner*, 900 F.2d 655, 661-662 (3d Cir. 1990), affg. in part and revg. in part 92 T.C. 510 (1989)). That argument, however, would miss the mark, inasmuch as it is the willfulness of the discrimination-inflicting party—the actor, rather than the acted upon—that separates willful from nonwillful discrimination, and gives rise to disparate remedies for what, arguably, is the same injury, viz, discrimination.

Likewise, it is not the quartum of suffering visited upon the victim of age discrimination that separates recompense for willful discrimination from recompense for nonwillful discrimination under the ADEA. A nonwillfully discriminated-against plaintiff under the ADEA may have suffered the same lost wages and consequential damages as a willfully discriminated-against plaintiff. Nevertheless, the statute only allows the nonwillfully discriminated-against plaintiff one-half the recovery allowed the willfully discriminated-against plaintiff. Such a distinction, based on willfullness, is common; indeed, a distinction based on intent is one of the most basic organizing concepts of legal thinking. Prosser & Keaton, Law of Torts 33 (5th ed. 1984). Intent is the key distinction between two major divisions of legal liability—negligence and intentional torts—and it plays a key role in criminal law, and elsewhere. *Id.* With regard to willful discrimination under the ADEA, the Supreme Court has accepted that, in that context, the term "willful" means conduct that is "not merely negligent". *Hazen Paper Co. v. Biggins*, __ U.S. __, 113 S. Ct. 1701, 1708 (1993). No matter how severe the consequences of nonwillful discrimination, Congress has

not thought it appropriate to make liquidated damages available for recompense thereof under the ADEA. The fundamental difference in treatment of willful and nonwillful discrimination under the ADEA should be accepted as sufficient to demonstrate the existence of two distinct (an mutually exclusive) cause of action. Certainly, if Congress had explicitly created different statutes dealing with, respectivley, willful and nonwillful age discrimination, it would be quite easy to perceive that two distinct (and mutually exclusive) causes of action are involved; that Congress chose to draw that distinction implicitly, rather than explicitly, ought be of no moment. To conclude otherwise would be to elevate form over substance, which clearly would be inappropriate.

III. *Conclusion*

Liquidated damages under the ADEA are not available in cases of nonwillful discrimination. The majority, for some unarticulated reason, considers that fact irrelevant, notwithstanding that its holding is dependent upon its finding that "the ADEA offers a range of remedies, including both unpaid wages and 'liquidated damages'." Majority op. p. 5. I disagree with the majority, and would conclude that (1) the ADEA creates distinct causes of action for willful and nonwillful age discrimination, (2) where the cause of action is for nonwillful age discrimination, the remedy of liquidated damages is not available, and (3) a cause of action for nonwillful discrimination, lacking remedies broader than those available under title VII, does not evidence a tort-like conception of injury and remedy and therefore does not redress a "tort-like personal injury" within the meaning of *United States v. Burke*, 504 U.S. __, 112 S. Ct. 1867 (1992). Because Mr. Downey's cause of action was for *willful* discrimination, for which

injury the sufficiently broad remedy of liquidated damages *is* available, I concur in the result reached by the majority.

WHALEN and BEGHE, *JJ.*, agree with this concurring opinion.

LARO, *J.*, concurring in part and dissenting in part: This case is before us pursuant to respondent's motion for reconsideration of our prior opinion in *Downey v. Commissioner*, 97 T.C. 150 (1991) (Downey I). In light of the Supreme Court's recent decision in *United States v. Burke*, 504 U.S. __, 112 S. Ct. 1867 (1992), respondent requested us to reconsider our earlier opinion in Downey I. Respondent's motion has been granted.

In *Burke*, the Supreme Court held that payments received by taxpayers in setttlement of backpay claims under title VII of the Civil Rights Act of 1964 (title VII), Pub. L. 88-352, 78 Stat. 253 (current version at 42 U.S.C. secs. 2000e-2000e-17 (1988)), are not excludable from gross income under section 104(a)(2). *United States v. Burke*, 504 U.S. at __, 112 S. Ct. at 1874. In nonliquidated damages and liquidated damages received by Burns P. Downey (petitioner)[1] in settlement of his claims under the Age Discrimination in Employment Act of 1967, Pub. L. 90-202, 81 Stat. 602 (current version at 29 U.S.C. secs. 621-634 (1988)), were excludable from his gross income under section 104(a)(2). The nonliquidated damages were received by petitioner as unpaid minimum wages (backpay). 29 U.S.C. secs. 216(b), 626(b). The liquidated damages were received by petitioner as an "additional equal amount" on account of a willful violation of the ADEA by petitioner's employer (United). 29 U.S.C. secs. 216(b), 626(b).

Following our reconsideration of Downey I, the majority reaffirms the case's expansive view of section 104(a)(2), notwithstanding the decision in *Burke*. I agree with my colleagues in the majority to the extent they reaffirm that the settlement proceeds received by petitioner as liquidated

[1] The wife of Burns P. Downey, Majorie Downey, is also a petitioner in this case. For purposes of simplicity and clarity, petitioner will be used solely to refer to Burns P. Downey.

damages are excludable from his taxable income under section 104(a)(2). I respectfully part company with them, however, with respect to the taxability of the nonliquidated damages because I believe the dissent in Downey I reached the correct conclusion with respect to the nonliquidated damages, and the dissent's conclusion is strengthened by the decision in *Burke*. The dissent in Downey I concluded that section 104(a)(2) does not exclude from taxation the amounts that petitioner received as nonliquidated damages. Downey I, *supra* at 174.

Section 61(a) generally provides that "Except as otherwise provided in [subtitle A of the Internal Revenue Code, see secs. 1 to 1563], gross income means all income from whatever source derived". In enacting section 61(a), and its statutory predecessors, Congress intended to "use the full measure of its taxing power". *Helvering v. Clifford*, 309 U.S. 331, 334 (1940).

It is well settled that the definition of gross income under section 61(a) is construed broadly to bring within its definition any accessions to wealth realized by taxpayers, and over which the taxpayers have complete dominion. *United States v. Burke*, 504 U.S. at __, 112 S. Ct. at 1870; *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955). It is equally well settled that the exclusions from gross income, such as the ones contained in subtitle A of the Internal Revenue Code, are matters of legislative grace and are construed narrowly to maximize the taxation of any accession to wealth. *United States v. Burke*, 504 U.S. at __, 112 S. Ct. at 1878 (Souter, J., concurring in the judgment); *United States v. Centennial Savings Bank FSB*, 499 U.S. __, __, 111 S. Ct. 1512, 1519 (1991); *Commissioner v. Jacobson*, 336 U.S. 28, 49 (1949). It rightfully follows that an accession to wealth, such as the receipt of the settlement proceeds by petitioner, must be included in the broad definition of gross income under section 61(a)

unless a narrowly construed exclusion of subtitle A of the Internal Revenue Code clearly directs otherwise. *United States v. Burke*, 504 U.S. at __, 112 S. Ct. at 1878 (Souter, J., concurring in the judgment).

It is undisputed that, but for an exclusion, all the settlement proceeds received by petitioner would be includable in the broad definition of gross income under section 61(a). The controversy is whether any, or all, of the settlement proceeds fall within the narrowly construed exclusion under section 104(a)(2). To the extent that petitioner's receipt of the settlement proceeds are not *clearly* within this narrowly construed exclusion, general rules of statutory construction mandate that the proceeds are taxable under section 61(a). *Id.*; *United States v. Centennial Savings Bank FSB, supra* at 1519; *Commissioner v. Jacobson, supra* at 49.

Section 104(a)(2) generally provides that gross income does not include "the amount of any *damages received* (whether by suit or agreement * * *) *on account of personal injuries* or sickness" (emphasis added). The text of section 104, the legislative history thereunder, and the regulations prescribed thereunder do not define the term "personal injuries". See, e.g., H. Rept. 1337, 83d Cong., 2d Sess. 15 (1954); S. Rept. 1622, 83d Cong., 2d Sess. 15-16 (1954). The term "damages received" was defined by the Treasury Department, in regulations published in 1956 under section 104(a)(2), as an "amount received * * * through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution." T.D. 6169, 1956-1 C.B. 63, 65. To date, this regulatory definition remains the same as when it was originally published.

From section 104(a)(2), and the regulations thereunder, we understand that damages received through prosecution of a legal suit or action, or through a settlement agreement

entered into in lieu of such prosecution, are excludable from gross income if the: (1) Damages were received on account of personal injuries, and (2) suit or action was based upon tort or tort type rights. Sec. 104(a)(2); sec. 1.104-1(c), Income Tax Regs. From *Burke*, we learn, once again, that we look to the nature of the claim underlying a taxpayer's damage award to determine whether the damages were received on account of personal injuries. *United States v. Burke*, 504 U.S. at __, 112 S. Ct. at 1872; see also *Rickel v. Commissioner*, 92 T.C. 510, 516 (1989), affd. in part and revd. in part 900 F.2d 655 (3d Cir. 1990), overruled by *Downey v. Commissioner*, 97 T.C. 150, 168-169 (1991); *Metzger v. Commissioner*, 88 T.C. 834, 847 (1987), affd. without published opinion 845 F.2d 1013 (3d Cir. 1988); *Threlkeld v. Commissioner*, 87 T.C. 1294, 1297 (1986), affd. 848 F.2d 81 (6th Cir. 1988); *Fono v. Commissioner*, 79 T.C. 680, 694 (1982), affd. without published opinion 749 F.2d 37 (9th Cir. 1984). This determination is factual and petitioner bears the burden of proving that respondent's determination is incorrect. Rule 142(a); *Welch v. Helvering*, 290 U.S. 111, 115 (1933).

In the case of a settlement, the nature of the claim generally is determined by looking to the settlement agreement. When the settlement agreement explicitly allocates the settlement proceeds between contract and tort claims,[2] the allocation generally is binding to the extent that it is entered into by the parties at arm's length and in good

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[2] In *United States v. Burke*, 504 U.S. __, __, 112 S. Ct. 1867, 1870-1871 (1992), the Supreme Court indicated that damages for a civil wrong are received on account of either a tort claim or a breach of contract claim, citing Keeton, Dobbs, Keeton, & Owen, Prosser and Keeton on the Law of Torts 2 (1984) ("A 'tort' has been defined broadly as a 'civil wrong, *other than breach of contract*, for which the court will provide a remedy in the form of an action for damages.' " (Emphasis added.)).

faith. *Fono v. Commissioner, supra* at 694. In this regard, an important factor in determining the reality of the agreement is the "intent of the payor" as to the reason for making the payment. *Knuckles v. Commissioner,* 349 F.2d 610, 613 (10th Cir. 1965), affg. T.C. Memo. 1964-33; *Metzger v. Commissioner, supra* 847-848; *Fono v. Commissioner, supra* at 694. The main question to ask is "In lieu of *what* were the damages awarded?" *Raytheon Production Corp. v. Commissioner,* 144 F.2d 110, 113 (1st Cir. 1944), affg. 1 T.C. 952 (1943) (emphasis added); *Fono v. Commissioner, supra* at 692.

Applying this analysis to the instant case, petitioner brought a lawsuit against United alleging age discrimination under the ADEA. In relevant part, petitioner's complaint contained two "causes of action".[3] With respect to the first cause of action, petitioner's complaint alleged that United's refusal to allow petitioner to serve as a second officer after petitioner turned 60 years old constituted unlawful age discrimination. Plaintiff's complaint also alleged, as a second cause of action, that United's action was a willful violation of the ADEA. Downey I, *supra* at 154.

Petitioner and United ultimately resolved this lawsuit in a settlement agreement entered into by the respective parties. Pursuant to the relevant provisions of this agreement, United paid to petitioner $120,000 in consideration of petitioner's release of all claims arising out of his employment relationship with United, whether or not asserted in

[3] The term "cause of action" means "The fact or facts which give a person a right judicial redress or relief against another. The legal effect of an occurrence in terms of redress to a party to the occurrence. A situation or state of facts which entitle party to sustain action and give him right to seek a judicial remedy in his behalf. * * * Matter for which action may be maintained." Black's Law Dictionary 221 (6th ed. 1990).

the ADEA. *Id.* at 155. The settlement agreement explicitly allocated $60,000 of this payment to nonliquidated damages and $60,000 to liquidated damages. The settlement agreement explicitly provided that the nonliquidated damages would be subject to all tax withholdings and tax deductions as required by law. *Id.* at 155. Thus, it is clear that the settlement agreement allocated the settlement proceeds between two separate components, one of which constituted backpay, and that this was the intent of the parties.

A claim of willful discrimination under the ADEA, such as the one made by petitioner, contains elements of both contract and tort. *Rogers v. Exxon Research & Engineering Co.,* 550 F.2d 834, 838-842 (3d Cir. 1977); *Rickel v. Commissioner, supra* at 520-521. Thus, in order to determine the taxability of petitioner's recovery under the ADEA, we must bifurcate the settlement proceeds into the part attributable to the contract claim and the part attributable to the tort claim. To the extent that the bifurcated part falls on the tort side of the line, the amount is excludable from gross income under section 104(a)(2). To the extent that the bifurcated part falls on the contract side of the line, the amount is includable in gross income under section 61(a).

A suit that requests damages for backpay, and that arises out of the breach of an employment agreement, is a contract action. *Rogers v. Exxon Research & Engineering Co., supra* at 838; see also *United States v. Burke,* 504 U.S. at __, 112 S. Ct. at 1878 (Souter, J. concurring in the judgment) (the awarding of backpay is "quintessentially a contractual measure of damages"). In this regard, ADEA's ban on age discrimination, like title VII's ban on sex discrimination, is easily seen as a contractual provision implied in every contract as a matter of law. See, e.g., *United States v. Burke,* 504 U.S. at __, 112 S. Ct. at 1878 (Souter,

J. concurring in the judgment). The primary goal in making compensatory damages available in an ADEA action is to restore age discrimination victims to the economic state they would have been in but for the intervening unlawful discriminatory conduct of their employer. *Kossman v. Calumet County,* 800 F.2d 697, 703 (7th Cir. 1986); *Rodriquez v. Taylor,* 569 F.2d 1231, 1238 (3d Cir. 1977). In other words, the compensatory damages under the ADEA allows victims of age discrimination to enjoy the benefit of the bargain they were expecting to receive when they entered into the employment contract with their respective employers. The fact that the right to recover the backpay arises from a statute, such as the ADEA, instead of common law, does not change the essential nature of the case. *Rogers v. Exxon Research & Engineering Co., supra* at 838.

Accordingly, any amount that petitioner received for nonliquidated damages falls on the contract side of the line, and, to that extent, the recovery is not excludable from gross income under section 104(a)(2). Cf. Rev. Rul. 72-341, 1972-2 C.B. 32 (payments from employer to employee in settlement of title VII action are includable in the employee's gross income because the payments would have been received as taxable wages but for the discrimination); see also *United States v. Burke,* 504 U.S. at __, 112 S. Ct. at 1874 n.13 (rev. Rul. 72-341, 1972-2 C.B. 32, cited with approval). It is undisputed that, but for the discrimination, an amount awarded as backpay would be taxable upon receipt. Sec. 61(a)(1). The awarding of liquidated damages, on the other hand, is a recovery for a tort or tortlike injury. *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 125 (1985) (liquidated damages awarded under the ADEA are punitive in nature). As such, any amount that petitioner received for liquidated

damages falls on the tort side of the line, and, to that extent, the recovery is excludable from gross income under section 104(a)(2).

It appears that the majority is troubled by the thought of bifurcating a recovery between its tort and contract components. To the majority, it appears, a recovery must be all contract or all tort. To support this proposition, the majority cites and relies on our recent decision in *Horton v. Commission,* 100 T.C. __ (1933).

In *Horton,* the defendant paid the plaintiffs/taxpayers both compensatory and punitive damages in connection with a personal injury that the taxpayers sustained when their home was destroyed by a gas explosion and fire caused by the defendant. With respect to the punitive damages, we held that those damages were excludable from the taxpayers' gross income under section 104(a)(2. In so doing, we started that "Once the nature of the underlying claim is established as one for personal injury, any damages received on account of that claim, including punitive damages, are excludable." *Id.* at __ (slip op. at 7).

With regard to *Horton,* it is important to note that we explicitly stated that respondent did not argue that part of the punitive damages were allocated to something other than personal injury (e.g., property damage). *Id.* at __ (slip op. at 4 n.3). As Judge Beghe noted in his concurrence, the result might well have been different, in part, if respondent had made such an argument. *Id.* at __ (slip op. at 16). More specifically, to the extent that the punitive damages in *Horton* were attributable to property damage, a strong argument could have been made that those punitive damages were taxable because they were not received "on account of personal injuries."

This bifurcation approach is supported by many of our decisions prior to Downey I. These prior cases were

thoroughly discussed in Judge Cohen's opinion in Downey I, see *Downey v. Commissioner,* 97 T.C. 150, 175-180 (1991) (Cohen, J., concurring in part and dissenting in part), and need not be discussed here. By this reference, however, Judge Cohen's discussion of these cases is incorporated herein. See also *Stocks v. Commissioner,* 98 T.C. 1, 17 (1992) (the Court also applied this bifurcation approach to the facts of a case decided after Downey I).

The majority herein fails to discuss the taxability of proceeds received in connection with a nonwillful violation under the ADEA, understandably so seeing that this case involves a willful violation. Notwithstanding that a nonwillful violation is not at issue here, I believe that a resolution of this case requires a brief discussion of the taxability of proceeds received in connection with a nonwillful violation. In the case of a nonwillful violation, it appears that a plaintiff's recovery, which is limited solely to backpay, see 29 U.S.C. sec. 626(b) (prevailing plaintiff entitled to additional equal amount only in cases of willful violations); *Hazen Paper Company v. Biggins,* __ U.S. __, __, 113 S. Ct. 1701, 1708-1709 (1933) (same), is not excludable under section 104(a)(2) because the recovery flows from a breach of contract. See, e.g., *United States v. Burke,* 504 U.S. at __, 112 S. Ct. at 1874 ("we cannot say that a statute such as title VII, *whole sole remedial focus is the award of backwages,* redresses a tort-like personal injury within the meaning of section 104(a)(2) and the applicable regulations." (Emphasis added; fn. ref. omitted.)). If this is the case, as it appears, it seems illogical that a taxable recovery becomes nontaxable merely because the taxpayer/plaintiff establishes that the employer's violation is willful, and is awarded an additional equal amount on account of such a violation.

In conclusion, the majority in Downey I stated that "we no longer can distinguish age discrimination from sex discrimination". Downey I, *supra* at 168. If this is so, we should reverse our decision in Downey I because we have recently learned that an amount received on account of sex discrimination under title VII is not excludable from income under section 104(a)(2). *United States v. Burke,* 504 U.S. at __, 112 S. Ct. at 1874. Because I believe that the taxability of backpay recovered under title VII is commensurate with the taxability of backpay recovered under the ADEA,[4] I respectrfully dissent.

JACOBS, *J.*, agrees with this concurring in part and dissenting in part opinion.

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[4] See, e.g., *Hodgson v. First Federal Savings and Loan Association,* 455 F.2d 818, 820 (5th Cir. 1972) (substantive provisions of the ADEA generally are, in terms, identical to those of Title VII except that "age" has been substituted for "race, color, religion, sex, or national origin"); *Rickel v. Commissioner,* 92 T.C. 510, 517 (1989), affd. in part and revd. in part 900 F.2d 655 (3d Cir. 1990), overruled by *Downey v. Commissioner,* 97 T.C. 150, 168-169 (1991).

APPENDIX C

UNITED STATES TAX COURT
WASHINGTON, D. C. 20217

Docket No. 22909-90
[ADEA]

ERICH E. AND HELEN B. SCHLEIER, PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT

ORDER

On August 10, 1992, petitioners' Motion for Summary Judgment was filed, and on September 8, 1992, respondent's Notice of Objection to Petitioners' Motion for Summary Judgment was filed. The parties agree that there is no dispute as to material facts and the issues may be decided as a matter of law. Respondent's objection is based on the claim that the opinion of the Supreme Court in *United States v. Burke,* 504 U.S. __ (1992), justifies reconsideration of this Court's position in *Downey v. Commissioner,* 97 T.C. 150 (1991). In *Downey v. Commissioner,* 100 T.C. 40 (filed June 29, 1993), the Court reaffirmed the result in *Downey v. Commissioner,* 97 T.C. 150 (1991). Upon due consideration and for cause, it is hereby

ORDERED: That petitioners' Motion for Summary Judgment is granted. It is further

ORDERED: That, on or before August 16, 1993, the parties shall, jointly or separately, submit to the Court their computations for decision and proposed decision in this case.

/s/Mary Ann Cohen
MARY ANN COHEN, Judge

Dated: Washington, D. C.
July 7, 1993

APPENDIX D

UNITED STATES TAX COURT

Docket No. 22909-90
[ADEA]

ERICH E. SCHLEIER AND HELEN B. SCHLEIER,
PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

DECISION

Pursuant to the Order of the Court dated July 7, 1993, and incorporating the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there is an overpayment in income tax for the taxable year 1986 in the amount of $31,495.00, which amount was paid on April 15, 1987, and for which amount a claim for refund could have been filed, under the provisions of I.R.C. § 6511(c) on September 17, 1990, the date of mailing of the notice of deficiency.

/s/Mary Ann Cohen
MARY ANN COHEN, Judge

Entered: AUG 31, 1993

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5555

ERICH E. SCHLEIER AND HELEN B. SCHLEIER,
PETITIONERS-APPELLEES,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDANT-APPELLANT.

Appeal from the Decision of the United States Tax Court

[FILED JUN 17, 1994]

ON SUGGESTION FOR HEARING EN BANC

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

No Judge in regular active service on the Court having requested that the Court be polled on hearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Hearing En Banc is DENIED.

ENTERED BY THE COURT:

/s/ PAT S. HIGGINBOTHAM
United States Circuit Judge

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5555
Summary Calendar

ERICH E. SCHLEIER AND HELEN B. SCHLEIER,
PETITIONERS-APPELLEES,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDANT-APPELLANT.

Appeal from the Decision of the United States Tax Court

[FILED JUN 21, 1994]

(22909-90)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Erich E. Schleier received a settlement for back pay and liquidated damages under the Age Discrimination in Employment Act. 29 U.S.C. §§ 621-34. Schleier and his

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

wife, Helen B., paid federal income taxes on the back pay but not on the liquidated damages. The government issued a statutory notice of deficiency for failure to pay taxes on the liquidated damages. The Schleiers responded that they were entitled to a refund for the taxes they paid on the back pay. The United States Tax Court concluded that the entire settlement under the ADEA was excludable from Schleier's income pursuant to Section 104(a)(2) of the Internal Revenue Code. 26 U.S.C. § 104(a)(2). The government appeals. We have already decided the issue. Money recovered under the ADEA is excludable from income for the purposes of taxation. *Purcell v. Sequin State Bank and Trust Co.*, 999 F.2d 950 (5th Cir. 1993). We AFFIRM.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-3763

BURNS P. AND MARJORIE DOWNEY, PLAINTIFFS-APPELLEES

v.

COMMISSIONER OF INTERNAL REVENUE,
DEFENDANT-APPELLANT

Appeal from the Decision of the United States Tax Court.
No. 11120—Robert P. Ruwe, Tax Court Judge.

ARGUED APRIL 11, 1994
DECIDED AUGUST 30, 1994

Before CUMMINGS, FLAUM and KANNE, Circuit Judges.

FLAUM, Circuit Judge.

I. Background

United Air Lines Inc. ("United") forced Burns Downey, an airline pilot, into retirement at the age of sixty. Burns responded by filing a federal suit alleging a violation of the ADEA. See 29 U.S.C. secs. 621 et seq. On December 27, 1985, Burns and United entered into a settlement agreement—for $120,000 Burns agreed to release United from

all claims. The parties structured their settlement payments by calling half of the money "back-pay," and the other half "liquidated damages." The Downeys' reported only the back-pay portion ($60,000) as income on their 1985 tax return. On February 23, 1989, the IRS issued a notice of deficiency to the taxpayers of $43,237 for 1985. In response the Downeys filed a petition in the Tax Court seeking a redetermination of the assessment. The Downeys claimed an exception for both the liquidated damages and back-pay portions of the settlement payment.

On a fully stipulated factual record the Tax Court held that both portions of the ADEA settlement payment were excludable from gross income under IRC sec. 104(a)(2). However, upon learning of Burke v. United States, 929 F.2d 1119, 1123 (6th Cir. 1991) ("Burke I"), rev'd 112 S.Ct. 1867 (1992) ("Burke"), then pending before the Supreme Court, the Tax Court withheld issue of its mandate. After the Supreme Court released Burke (holding that back-pay settlment awards received under Title VII are not excludable under IRC sec. 104(a)(2)), 112 S.Ct. at 1873, the Commissioner filed a motion in the Tax Court for reconsideration (under Burke) of the Downeys' claim. After review the Tax Court issued a supplemental opinion holding that (1) the ADEA "evidence[d] a tort-like conception of injury and remedy" for purposes of Burke, and (2) all of the Downeys' damages received through their ADEA litigation are excludable from tax.

II. Discussion

On appeal the Commissioner argues that an ADEA settlement payment providing for the separate payment of back-pay and liquidated damages does not fit within any recognized tax exception including IRC sec. 104(a)(2). We agree. Since Stanton v. Baltic Mining Co., 240 U.S. 103

(1916), the United States can require persons who receive income within its jurisdiction to share part of that income with the national treasury though direct federal income taxes. To this end Congress has defined taxable income to include, generally, all income not specifically excluded by the code. See IRC secs. 61-63. As the Supreme Court has observed, Congress "exert[ed] the full measure of its taxing power, and [brought] within the definition of income any accession to wealth." Burke, 112 S.Ct. at 1870 (citations omitted). Thus, all accessions to wealth are taxable unless a taxpayer can fit his gain into a statutory exception. The Downeys believe they have found such an exception. Damages received from a personal injury lawsuit, as provided under IRC sec. 104(a)(2), are among those sources of gain that have been statutorily excepted from taxation. The text of IRC sec. 104(a)(2) provides as follows:

> Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include . . . the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness;

Our task is to determine whether settlement payments pursuant to an ADEA lawsuit fall within this exception.

In reading sec. 104(a)(2) we note that the taxable status of a settlement agreement must be determined by the nature of the claim upon which the litigation was first based. The text of sec. 104(a)(2)—"the amount of any damages received (whether by suit or agreement . . .)"—indicates that payments of a settlement agreement are to be treated for tax purposes as if the money came by an award in the underlying suit. See Burke, 112 S.Ct. at 1872

(holding that the taxable character of the settlement payment must be the same as if the payment arose from an award on the underlying claim). Thus, before we may characterize the Downeys' settlement agreement we must analyze the character of the damages available under an ADEA suit. We again find relevant language in the text of sec. 104(a)(2). The language of the text limits the exception to only "damages received . . . on account of personal injuries or sickness. . . ." IRC sec. 104(a)(2). Justice Scalia cogently argued that the plain language of sec. 104 must be read as only excluding awards from injuries to a taxpayer's physical or mental health (and consequently awards such as the Downeys' would not be excludable under sec. 104(a)(2)). See Burke, 112 S.Ct. at 1874 (Scalia J., concurring). The treasury regulations drafted to enforce sec. 104(a)(2) have interpreted the term "damages" to mean an amount received through prosecution or settlement of an action based upon tort or tort-type rights. Treas. Reg. sec. 1.104-1(c). This treasury regulation deserves judicial deference so long as the agency's interpretation is within the reasonable range of the statutory text. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45 (1984). Justice Scalia has suggested that this regulation so misses the mark when compared with the language of IRC sec. 104(a) that it is not entitled to deference under Chevron. Burke, 112 S.Ct. at 1874 (Scalia J. concurring). While this view has considerable attraction, we need not consider the viability of the treasury regulation if we find that a suit under the ADEA does not even clear the Treasury's low hurdle of being "tort-type" (and thus its damages constitute taxable income regardless).

The issue of whether ADEA claims are at least tort-like, while new to our court, has been addressed by other courts of appeal. See Rickel v. Commissioner, 900 F.2d 655 (3d

Cir. 1990) (holding for the exclusion of such settlement agreements from taxation under sec. 104); Pistillo v. Commissioner, 912 F.2d 145 (6th Cir. 1990); and Redfield v. Insurance Company of North America, 940 F.2d 542 (9th Cir. 1991). We note, however, that all these decisions antedate the Supreme Court's explanation of sec. 104(a)(2) in Burke. As the Tax Court recognized that the analytical framework adopted in Rickel, Pistillo and Redfield was inconsistent with the approach later taken in Burke, we limit our discussion to Burke as the most pertinent teaching on this matter.

In Burke, the Court reversed a Sixth Circuit decision that had held back-pay (received in settlement of a Title VII lawsuit) excludable from gross income under sec. 104(a)(2). See Burke I, 929 F.2d at 1123, rev'd 112 S.Ct. at 1870. The court of appeals had adopted the reasoning of both Pistillo and Rickel in rejecting the federal government's position that the remedies provided by the statute determined whether the provision created a tort-type right. In reversing the Sixth Circuit, however, the Court expressly defined a tort as a " 'civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages,' " Burke, 112 S.Ct. at 1870-71 (quoting W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser & Keeton on the Law of Torts 2 (1984)), and emphasized that "it is solely by virtue of the right to damages that the wrong complained of is to be classed as a tort.' " Burke, 112 S.Ct. at 1871 (quoting R. Heuston, Salmond on the Law of Torts 9 (12th ed. 1957)). The Court reasoned that because the concept of a tort is inextricably bound up with the nature of the remedies, the remedial scheme embodied in the statute is the critical factor for sec. 104(a)(2) purposes. Burke, 112 S.Ct. at 1872 n.7 ("We believe that consideration of the remedies available under Title VII is critical in determining the 'nature of the

statute' and the 'type of claim' brought by respondents for purposes of sec. 104(a)(2)"). The Court then examined the nature of the remedies provided by Title VII and concluded that the statute did not redress a tort-type personal injury within the meaning of sec. 104(a)(2). Burke, 112 S.Ct. at 1872-74.

Burke teaches us that the hallmark of tort liability is the availability of a broad range of damages to compensate the plaintiff for injuries caused by the violation of a legal right, and while such damages often are described in compensatory terms, tort damages usually "redress intangible elements of injury." See Burke, 112 S.Ct. at 1871. We believe that Burke stands for the proposition that a federal anti-discrimination statute must provide compensatory damages for intangible elements of personal injury (such as pain and suffering, emotional distress, or personal humiliation) to constitute a tort-type personal injury and receive tax exempt treatment under sec. 104(a)(2). The issue in this case, therefore, reduces to whether the ADEA provides compensatory damages for those intangible elements of injury essential to a personal injury tort action.

Congress created the ADEA in the hope of promoting the employment of older persons by banning arbitrary age discrimination. See Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, sec. 2(b), 81 Stat. 602. The remedial provision of the ADEA empowers courts "to grant such legal or equitable relief as may be appropriate to effectuate the purposes of [the statute]." 29 U.S.C. sec. 626(b). Significantly, however, for sec. 104(a)(2) purposes, litigants under the ADEA may not recover the broad range of compensatory damages for intangible elements of injury that characterize tort-type personal injury statutes. ADEA litigants cannot recover damages for either pain and suffering, Pfeiffer v. Esses Wire Corp.,

682 F.2d 684, 687-88 (7th Cir.), cert. denied, 459 U.S. 1039 (1982), or for emotional distress, Johnson v. Al Tech Specialties Steel Corp., 731 F.2d 143, 147 (2d Cir. 1984). With respect to remedies, the only difference between the scheme embodied under the ADEA and that under Title VII is that under the ADEA a plaintiff may often recover liquidated damages in addition to lost wages when the employer's violation of the statute has been willful. See 29 U.S.C. sec. 626(b) (providing for equitable, judicial and legal relief for violation of the ADEA); see also Hazen Paper Co. v. Biggins, 113 S.Ct. 1701, 1710 (1993) (holding that liquidated damages were available when an employer knows its conduct is illegal). Thus, unless the nature of the ADEA liquidated damages recompense for the intangible elements of a tort-type injury, we are bound by Burke to hold that all ADEA damages are nonexcludable under sec. 104(a)(2).

At the present time there is a division in the courts of appeals over the character of the ADEA liquidated damages. Some circuits have stated that the character of liquidated damages is strictly punitive, see Reichman v. Bonsignore, Brignati & Mazzota P.C., 818 F.2d 278, 282 (2d Cir. 1987); Criswell v. Western Airlines Inc., 709 F.2d 544, 556-57 (9th Cir. 1983), aff'd on other grounds, 472 U.S. 400 (1985); Lindsey v. American Cast Iron Pipe Co., 810 F.2d 1094, 1102 & n.7 (11th Cir. 1987), while others have stated that ADEA liquidated damages replace prejudgment interest, see Power v. Grinnell Corp., 915 F.2d 34, 41-42 (1st Cir. 1990); Hamilton v. 1st Source Bank, 895 F.2d 159, 166 (4th Cir. 1990); McMann v. Texas City Refining, Inc., 984 F.2d 667, 673 (5th Cir. 1993); Rose v. National Cash Register Corp., 703 F.2d 225, 229-30 (6th Cir. 1983). This court adheres to the position that ADEA liquidated damages replace prejudgment interest, see e.g., Fortino v. Quasar Co., 950 F.2d 389, 397-89 (7th Cir.

1992); EEOC v. O'Grady, 857 F.2d 383, 391 n.13 (7th Cir. 1988); Coston v. Plitt Theaters, Inc., 831 F.2d 1321, 1335-37 (7th Cir. 1987), vacated on other ground, 486 U.S. 1020 (1988), on remand, 860 F.2d 834 (7th Cir. 1988). The rational implication is that as a replacement for prejudgment interest, liquidated damages, as the name implies, compensate a party for those difficult to prove losses that often arise from a delay in the performance of obligations—as a type of contract remedy. See Rex Trailer Co. v. United States, 350 U.S. 148, 151 (1956) (discussing liquidated damages as they relate to contractual remedies). In any event, whatever the appropriate characterization of ADEA liquidated damages (be they punitive or contractual), as a matter of law they do not compensate for the intangible elements of a personal injury. Thus lacking an essential element of a tort-type claim, such damages cannot be excluded from taxation under sec. 104(a)(2). The Downeys' back-pay and liquidated damages payments are taxable. This case is reversed and remanded to the tax court for proceedings consistent with this opinion.

REVERSED and REMANDED.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-70960
Tax Court No. 4844-90

JOHN A. SCHMITZ, MARY B. SCHMITZ,
PETITIONERS-APPELLEES

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT-APPELLANT

Appeal from a Decision of the United States Tax Court

Argued and Submitted
April 11, 1994—San Francisco, California
Filed August 30, 1994

Before: Alfred T. GOODWIN, Warren J. FERGUSON and Stephen S. TROTT, Circuit Judges.

Opinion by Judge GOODWIN;
Concurrence by Judge TROTT

Tax/Income

The court of appeals affirmed a tax court judgment, holding that damages a taxpayer received in settlement of an Age Discrimination in Employment Act (ADEA) lawsuit was excludable from gross income as damages received on account of personal injuries or sickness.

OPINION

GOODWIN, Circuit Judge:

The Commissioner appeals a tax court summary judgment granted in favor of taxpayers John and Mary Schmitz. The Commissioner argues that damages the Schmitzes received in settlement of an Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 et seq., lawsuit are taxable income. The tax court held that the Schmitzes' ADEA settlement was excludable from gross income as "damages received . . . on account of personal injuries or sickness." 26 U.S.C. § 104(a)(2) (1988). We affirm.

I.

John Scmitz is a former employee of United Airlines, Inc. ("United") and a plaintiff in an ADEA class action against United. In 1986, United paid Schmitz $115,050 in settlement of his age discrimination claims. According to the settlement agreement, half of this payment was "back pay" and the other half was "ADEA liquidated damages."

The Schmitzes initially reported the back wages portion of the settlement as gross income received in 1986, excluding the liquidated damages. The Commissioner issued a notice of deficiency, alleging that the Schmitzes' entire award was taxable. The Schmitzes filed a tax court petition, arguing that the liquidated damages portion of the settlement was excludable from gross income under 26 U.S.C. § 104(a)(2). After the Third Circuit decided Rickel v. Commissioner, 900 F.2d 655 (3d Cir. 1990), the Schmitzes amended their petition, claiming that both the back pay and the liquidated damages were excludable.

The tax court held that the Schmitzes' entire settlement was excludable from gross income under Downey v. Com-

missioner, 97 T.C. 150 (1991), aff'd on reconsideration, 100 T.C. 634 (1993), appeal pending, No. 93-3763 (7th Cir. Nov. 17, 1993). The Commissioner appealed.

II.

We review tax court decisions on the same basis as civil bench trials held in federal district court. Ball, Ball, & Brosamer, Inc. v. Commissioner, 964 F.2d 890, 891 (9th Cir. 1992). Thus, we review the tax court's grant of summary judgment de novo to determine whether there are any genuine issues of material fact and whether the tax court correctly applied the law. Stevens v. Moore Business Forms, Inc., 18 F.3d 1443, 1446 (9th Cir. 1994). Because this case presents no genuine issues of material fact, we agree that summary judgment was appropriate. We therefore review the tax court's legal conclusions de novo, Pacific First Fed. Savs. Bank v. Commissioner, 961 F.2d 800, 803 (9th Cir.), cert. denied, 113 S. Ct. 209 (1992), construing the relevant exeptions narrowly in favor of taxation. United States v. Centennial Savs. Bank, 499 U.S. 573, 583-84 (1991); United States v. Wells Fargo Bank, 485 U.S. 351, 354 (1988).

III.

At the time of the Schmitzes' settlement,[1] § 104(a)(2) provided:

[1] Congress has since amended § 104(a)(2) to provide that punitive damages received in cases not involving physical injury are not excludable. Pub. L. No. 101-239, § 7641(a), 103 Stat. 2379 (1989). However, these amendments are expressly limited to punitive damages received after June 10, 1989, and do not apply to the Schmitzes' 1986 award. We express no opinion on taxation of ADEA liquidated damages received after June 10, 1989, as that issue is not before us.

§ 104. Compensation for injuries or sickness

> . . . [G]ross income does not include—. . . (2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness. . . .

IRS regulations define "damages received" as "amount[s] received . . . through prosecution of a legal suit or action based upon tort or tort-type rights, or through a settlement agreement entered into in lieu of such prosecution." 26 C.F.R. § 1-104-1(c) (1993).

In Hawkins, we set forth a two-part test for determining whether damages received in a lawsuit are excludable under § 104(a)(2) (1988). United States v. Hawkins, No. 93-15828, slip op., ____ F.3d ____, ____ (9th Cir. July 19, 1994). We said a taxpayer must show both (1) that the underlying cause of action was tort-like within the meaning of United States v. Burke, 112 S. Ct. 1867, 1870 (1992), and 26 C.F.R. § 1.104-1(c), and (2) that the damages were received "on account of" the taxpayer's personal injury. Id. We must therefore decide (A) whether ADEA creates a tort-like cause of action and (B) whether the Schmitzes' back pay and liquidated damages were received on account of their personal injuries.

A. ADEA Creates a "Tort-like" Cause of Action.

Until recently, the case law firmly established that ADEA lawsuits were "tort-like" within the meaning of § 104(a)(2) and 26 C.F.R. § 1.104-1(c). See Redfield v. Insurance Co. of North America, 940 F.2d 542 (9th Cir. 1991); Pistillo v. Commissioner, 912 F.2d 145 (6th Cir. 1990); Rickel v. Commissioner, 900 F.2d 655 (3d Cir. 1990); Downey v. Commissioner, 97 T.C. 150 (1991).

However, these cases relied on Threlkeld v. Commissioner, 87 T.C. 1294, 1308 (1986), aff'd 848 F.2d 81 (6th Cir. 1988), which held that damages are excludable under § 104(a)(2) if they were "received on account of any invasion of rights that an individual is granted by being a person in the sight of the law."

The Supreme Court recently changed this analysis, suggesting that even lawsuits which meet the Threlkeld test might not be tort-like for purposes of § 104(a)(2) if they do not "evidence[ ] a tort-like conception of injury and remedy." United States v. Burke, 112 S. Ct. 1867, 1873 (1992). The Court, discussing damages awarded under the pre-1991 version of Title VII, agreed that "discrimination could constitute a 'personal injury' for purposes of § 104(a)(2)." Id. However, the Court found that the pre-1991 version of Title VII was not tort-like because it did not provide for jury trials or "allow awards for compensatory or punitive damages," instead "limit[ing] available remedies to back pay, injunctions, and other equitable relief." Id. at 1873-74.[2] According to the Court, this unavailability of jury trials and failure to "recompense Title VII plaintiffs for anything beyond the wages properly due them" distinguish pre-1991 Title VII actions from ordinary tort actions and actions filed under other federal antidiscrimination statutes, such as Title VIII and 42 U.S.C. § 1981. Id. at 1874.

Most post-Burke courts addressing the issue have held that ADEA damages are still excludable, even under the Supreme Court's more restrictive test. See, e.g., Purcell v.

[2] Congress has since amended Title VII to allow jury trials, compensatory damages, and punitive damages. Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (1991). Thus, the current version of Title VII may redress a tort-like personal injury. See Burke, 112 S. Ct. at 1874 n.12; Rev. Rul. 93-88.

Sequin State Bank & Trust Co., 999 F.2d 950, 960-61 (5th Cir. 1993); Downey v. Commissioner, 100 T.C. 634, 637 (1993); Bennett v. United States, 30 Fed. Cl. 396 (1994); Rice v. United States, 834 F. Supp. 1241, 1243-45 (E.D. Cal. 1993), appeal pending, No. 93-16272 (9th Cir. Sept. 9, 1993); cf. Abrams v. Lightolier, 841 F. Supp. 584, 596 (D.N.J. 1994) (addressing a state law age discrimination award).[3] As these courts have noted, ADEA, unlike the pre-1991 version of Title VII, provides for jury trials. Bennett, 30 Fed. Cl. at 399. In addition, while ADEA does not provide for pecuniary compensatory damages or punitive damages "by name", Rice, 834 F. Supp. at 1244, it does provide for "liquidated damages" in cases of willful discrimination. 29 U.S.C. § 626(b). These liquidated damages "serve to compensate the victim of age discrimination for certain nonpecuniary losses" and also serve "a deterrent or punitive purpose." Downey, 100 T.C. at 637; Rice, 834 F. Supp. at 1244. Thus, unlike the unamended version of Title VII, ADEA does not simply recompense plaintiffs for the wages properly due them.

The Commissioner argues that the remedies available under ADEA are still "circumscribed" within the Burke Court's meaning, Burke, 112 S. Ct. at 1873, because, like the unamended version of Title VII, ADEA does not provide damages for plaintiffs' emotion distress or pain and suffering. See Chancellier v. Federated Dep't Stores, 672 F.2d 1312, 1318 (9th Cir.), cert. denied, 459 U.S. 859 (1982); Naton v. Bank of California, 649 F.2d 691, 698-99 (9th Cir. 1981). The Commissioner argues that ADEA liquidated damages represent only punitive damages, and

[3] But see Maleszewski v. United States, 827 F. Supp. 1553 (N.D. Fla. 1993) (ADEA not tort-like); Shaw v. United States, ____ F. Supp. ____, 1994 WL 237039 (M.D. Ala. Apr. 5, 1994) (following Maleszewski).

thus the statute does not evidence a tort-like conception of remedy.

We disagree. The case law and legislative history indicate that ADEA liquidated damages have a compensatory as well as a punitive purpose. See Section B, infra. In addition, "Burke does not require that a statute provide the complete spectrum of tort remedies before it may be deemed to redress a tort-type right." Bennett, 30 Fed. Cl. at 400. As other courts have held, ADEA's liquidated damages provision, as well as its provision for jury trials, distinguishes ADEA from the statute discussed in Burke. Moreover, even if ADEA liquidated damages have a punitive purpose, such a purpose appears more tort-like than contract-like.

We cannot accept the Commissioner's argument that ADEA actions are basically ex contractu. See, e.g., Redfield, 940 F.2d at 546 ("Nothing in ADEA reflects a congressional attempt to rewrite the terms of employment contracts."). Contract rights arise from the parties' private-law relationship; each litigant's rights and duties depend primarily on the terms of their agreement. In contrast, a tort is "a 'legal wrong committed upon the person or property independent of contract' . . . 'a violation of some duty owing to the plaintiff, . . . generally, [arising] by operation of law and not by mere agreement of the parties.' " Downey, 97 T.C. at 160 (quoting Black's Law Dictionary, 1489 (6th ed. 1990)). The public-law duty not to discriminate exists regardless of the parties' contractual relationship; ADEA applies not only to firing and promotion decisions, but also to hiring decisions, when no contract exists. Downey, 97 T.C. at 169; Burke, 112 S.Ct. at 1879-80 (O'Connor, J., dissenting). For convenience and for statute of limitations purposes, most courts classify discrimination and civil rights violations as torts. See, e.g.,

Goodman v. Lukens Steel Co., 482 U.S. 656, 661 (1987); Wilson v. Garcia, 471 U.S. 261, 276 (1985).

The Burke majority acknowledged that discrimination could be a personal injury tort within the meaning of § 104(a)(2), as the pre-Burke courts had long held. 112 S. Ct. at 1873. The Court did not hold that employment discrimination, generally, was not a personal injury; it held only that the pre-1991 version of Title VII, with its "circumscribed remedies," did not evidence a tort-like conception of personal injury. Id. at 1873. In reaching this conclusion, the Court specifically relied on the unavailability of jury trials and the lack of compensatory or punitive damages in Title VII actions. Because both of these remedies are available under ADEA and because discrimination constitutes a personal injury, we conclude that ADEA establishes a tort-like cause of action within the meaning of Burke and § 104(a)(2).

B. The Schmitzes' ADEA Liquidated Damages Were Received "On Account of" Personal Injuries.

The Commissioner also argues that, even if ADEA creates a tort-like cause of action, the Schmitzes' liquidated damages are not excludable because these damages were awarded "on account of" United's willful misconduct, rather than "on account of" the Schmitzes' personal injury. § 104(a)(2).[4] We agree that § 104(a)(2)'s "on ac-

[4] The Commissioner does not make this argument about the Schmitzes' back pay award, apparently conceding that, if ADEA creates a tort-like cause of action, the Schmitzes' back pay or non-liquidated damages are excludable. We agree. Although this rule creates the somewhat anomalous result that back-pay and future earnings awarded in a lawsuit are not taxable, while "wages . . . paid in the ordinary course [of employment]" are fully taxable, Burke, 112 S. Ct. at 1874, this anomaly exists in physical injury cases as well. Id. at 1880 (O'Connor, J., dissenting). As the Third Circuit has noted, we must

count of" language, as well as its title, "Compensation for Personal Injury or Sickness," implies that damages are not excludable unless they have some compensatory purpose and bear some relationship to the taxpayer's underlying personal injury. Hawkins, _____ F.3d at _____; see also Reese v. United States, 24 F.3d 228 (Fed. Cir. 1994); Commissioner v. Miller, 914 F.2d 586 (4th Cir. 1990); Rice, 834 F. Supp. at 1245-46; Rev. Rul. 84-108.[5]

However, we do not agree that ADEA liquidated damages are solely punitive in nature or that they do not bear

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compare John Schmitz not to a current United employee, but to a United employee who can no longer work because of a lost arm or other personal injury. See Rickel, 900 F.2d at 664 ("Of course, it might be troubling to some that a successful plaintiff in an ADEA suit will make out better, vis-a-vis federal income tax liability, than if the plaintiff had not been discriminated against in the first place. . . . [However,] the successful ADEA plaintiff is being treated no better (or worse now) than the typical tort victim who suffers a physical injury").

Under § 104(a)(2), if a taxpayer receives damages for a personal injury "[a]ll income [including lost wages] in compensation of that injury is excludable under section 104(a)(2)." Threlkeld, 848 F.2d at 84. See also Burke, 112 S. Ct. at 1880 (O'Connor, J., dissenting); Purcell, 999 F.2d at 960 ("Back pay awards are nontaxable when they redress a tort-like injury."); Redfield, 940 F.2d at 546; Pistillo, 912 F.2d at 150; Rickel, 900 F.2d at 664 ("[J]ust as in the case of a physical personal injury, all the damages received by the taxpayer on account of age discrimination are excludable under § 104(a)(2)"); Downey, 97 T.C. at 165-69.

The Commissioner does not indicate whether United paid Federal Insurance Contributions Act ("FICA") taxes on the backpay award; thus, we express no opinion on whether backpay received under ADEA constitutes "wages" for FICA purposes. See Burke, 112 S. Ct. at 1869 n.1; Kendrick v. Jefferson County Bd. of Ed., 13 F.3d 1510, 1514 (11th Cir. 1994) (interpreting the Supreme Court's footnote as an "indicat[ion] that FICA taxation may be a different matter").

[5] But see Horton v. Commissioner, 100 T.C. 93 (1993), appeal pending, No. 93-1928 (6th Cir. July 13, 1993).

any relation to the underlying personal injury. ADEA on its face provides for "liquidated," not punitive, damages. 29 U.S.C. § 626(b). Liquidated damages were traditionally awarded to compensate victims for damages which are too obscure and difficult to prove. See Brooklyn Savings Bank v. O'Neill, 324 U.S. 697, 707 (1945) ("The liquidated damage provision [of the Fair Labor Standard Act, on which ADEA is based] is not penal in its nature but constitutes compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages."); Overnight Motor Transp. Co., Inc. v. Missel, 316 U.S. 572, 583-84 (1942) ("[L]iquidated damages are compensation, not a penalty or punishment by the Government . . . the retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages."); see also Black's Law Dictionary 6th Ed. at 391 (1990) (liquidated damages, unlike penalties, represent a "good faith effort to estimate [the] actual damages that will probably ensue").

The concurrence contends that the term "liquidated," despite its appearance in the text of the statute, is a "misnomer," and that ADEA liquidated damages are in fact punitive damages.[6] However, ADEA liquidated damages

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[6] In support of this assertion, the concurrence states that ADEA liquidated damages are distinguishable from FLSA liquidated damages because the former are awarded only for "willful" violations, while (according to the concurrence) latter are awarded "automatically." However, as the concurrence concedes in a footnote, FLSA also gives the judge discretion not to award liquidated damages (or to award reduced liquidated damages), if the violation is not willful. Thus, the difference between these two damages provisions is not nearly as great as the concurrence suggests: In ADEA, plaintiffs get liquidated damages if the violation was willful; in FLSA, they get liquidated damages unless the employer proves that the violation was not willful. While the burden of proof may differ, under both statutes, liquidated damages depend on the culpability of the employer.

differ from common law punitive damages in significant ways. More importantly, we believe that looking beyond Congress's explicit language and attempting to discern whether Congress's "real purpose" was punitive or compensatory will "sow more confusion than clarification." If Congress said "liquidated," we will assume that Congress meant liquidated.

Nor do we believe that the "liquidated" label is in fact a misnomer. Unlike common law punitive damages, ADEA liquidated damages do bear a relation to the underlying personal injury: They must equal the plaintiff's total pecuniary loss. 29 U.S.C. § 626(b); Cassino v. Reichhold Chemicals, Inc., 817 F.2d 1338, 1348-49 (9th Cir. 1987), cert. denied, 484 U.S. 1047 (1988). Thus, unlike the punitive damages discussed in Hawkins, which were based on the defendant's conduct and wealth, and have no relation to the plaintiff's particular injury, ADEA liquidated damages are proportionate to the personal injury suffered: The more severe the plaintiff's economic injury, the greater her ADEA liquidated damage award.

As the Commissioner and the concurrence emphasize, ADEA liquidated damages likely also have a punitive purpose—they are available only for "willful" violations and serve not only to compensate but also to deter. See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125 (1985) (stating, in interpreting ADEA's "willfulness" requirement, that "Congress intended [ADEA] liquidated damages to be punitive in nature"); Criswell v. Western Airlines, Inc., 709 F.2d 544, 556 (9th Cir. 1983), aff'd 472 U.S. 400 (1985) (stating, in a different context, that "[l]iquidated damages are a substitution for punitive damages and [are] intended to deter intentional violations of the ADEA") (internal quotations and citations omitted).[7]

[7] See also Riechman v. Bonsignore, Bragnati & Mazzotta, P.C., 818 F.2d 278, 281-82 (2d Cir. 1987); Lindsay v. American Cast Iron Pipe, Co., 810 F.2d 1094, 1102 (11th Cir. 1987).

However, the mere fact that liquidated damages are available in cases of "willful" discrimination does not transform them into punitive damages or eliminate their compensatory purpose. Accord, Rivera v. Anaya, 726 F.2d 564, 569 (9th Cir. 1984) (interpreting a similar double damage provision as "compensation, not a penalty" even though the damages at issue were available only for "intentional violations."). In enacting ADEA, Congress was likely attempting to balance the need to compensate victims and deter discrimination with the need to protect businesses from crushing liability. Unlike the concurrence, we see nothing "peculiar" in Congress's decision to resolve these competing interests by compensating victims of willful discrimination at a higher rate than victims of "nonwillful discrimination: Congress has simply decided as a public policy matter that only victims of willful discrimination should receive obscure and difficult to prove compensatory damages.

For purposes of § 104(a)(2), the proper inquiry is not the damages' relationship to the tortfeasor, but their relation to the taxpayer. See Downey, 97 T.C. at 171. Like the Downey Court, we do not believe Thurston addressed ADEA liquidated damages "from the recipient's perspective" or found that ADEA liquidated damages, from the recipient's perspective, do not represent "compensation for those losses that are hard to calculate." Id. Rather, most courts recognize that ADEA liquidated damages serve both a compensatory and a deterrent function.[8] See,

[8] The concurrence asks "what's left to compensate?", citing cases holding that ADEA liquidated damages do not duplicate state damage awards for lost interest, emotional distress, and pain and suffering. However, we have also said that "[p]unitive . . . damages. . . , unavailable under the ADEA, do not duplicate the ADEA award for back pay, lost benefits, and liquidated damages." Chancellier, 672 F.2d at 1318. Moreover, exactly what injuries ADEA liquidated re-

e.g., Fortino v. Quasar, Co., 950 F.2d 389, 397-98 (7th Cir. 1991); Powers v. Grinnell Corp., 915 F.2d 34, 41-42 (1st Cir. 1990); Burns v. Texas City Refining, Inc., 890 F.2d 747, 753 (5th Cir. 1989); Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195, 200 (4th Cir. 1990); Graefenhain v. Papst Brewing Co., 870 F.2d 1198, 1205 (7th Cir. 1989); Blum v. Witco Chemical Corp., 829 F.2d 367, 382 (3d Cir. 1987). The Conference Report for the 1978 Amendments to ADEA supports this view:

> [ADEA] liquidated damages (calculated as an amount equal to the pecuniary loss) [ ] compensate the aggrieved party for nonpecuniary losses arising out of a willful violation of the ADEA.
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> . . . The ADEA as amended by this act does not provide remedies of a punitive nature.

H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 13-14, reprinted in 1978 U.S.C.C.A.N. 528, 535.

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dress will inevitably vary from case to case; none of the cases the concurrence cites involve plaintiffs who were compensated for all of the damages mentioned. ADEA liquidated damages might compensate some plaintiffs for the emotional distress and future psychic injuries they may suffer upon return to work, for lost future wages which they cannot mitigate, for lost reputation, for their families' emotional distress and suffering, for the psychic tool of suing one's employer or any number of other injuries. Cf. Brooks v. Hilton Casinos Inc., 959 F.2d 757, 767 (9th Cir. 1992) (trial court did not abuse its discretion in refusing to award front pay where plaintiff received liquidated damages), cert. denied, 113 S. Ct. 300 (1992); Cancellier, 672 F.2d at 1319 (value of reinstatement is speculative especially where the discord between employee and employer may make reinstatement infeasible). Because each employee's injuries differ—in ways that cannot be calculated—we need not devise a consistent explanation of the precise injuries ADEA liquidated damages redress. Rather, we believe that Congress's use of the term liquidated is dispositive.

The concurrence worries that we are holding that "large awards (which we may think are excessive) are taxable (e.g., Hawkins), but small awards (which we may think are more reasonable) are not taxable (e.g., this case)." Whatever the emotional appeal of such a rule, we agree with the concurrence that it would be utterly unworkable and we would not suggest it. Our test is not "how big is the award," but "does it have a compensatory purpose?" Liquidated damages are traditionally compensatory; punitive damages are not. Thus, ADEA liquidated damages are nontaxable; punitive damage awards such as those discussed in Hawkins are. Accord, Miller, 914 F.2d at 591.

Because ADEA liquidated damages serve both to punish the employer and to compensate the taxpayer for intangible losses, and because Congress chose to label them "liquidated" rather than "punitive", ADEA liquidated damages are, from the taxpayer's perspective, damages received on account of personal injury. They are therefore excludable under § 104(a)(2). Accord, Miller, 914 F.2d at 591; Bennett, 30 Fed. Cl. at 401; Downey, 100 T.C. at 634.

AFFIRMED.

TROTT, Circuit Judge, concurring in the judgment:

I agree with the majority's conclusion that all damages received in settlement of an ADEA claim are excludable from gross income under § 104(a)(2) of the Internal Revenue Code. As I explained in my dissent in Hawkins v. United States, No. 93-15828, slip op. 7949, 7965 (9th Cir. July 19, 1994), I respectfully disagree with the majority's adoptino of a two-part test for analyzing whether damages are excludable under § 104(a)(2). Like the Tax Court, I believe the focus should be on whether the ADEA redresses a tort-like personal injury claim. See Downey v.

Commissioner, 100 T.C. 634, 657 (1993). If the answer is yes, all damages received on account of that claim are not taxable. Because I agree with the majority that the ADEA creates a tort-like cause of action, both the backpay award and the liquidated damages award in this case should not be taxable.

The majority, however, has to square this result with the test they created in Hawkins. In Hawkins, the majority held that punitive damages received in a tort case are taxable because they are "not necessarily awarded 'on account of' personal injury; rather, they are awarded 'on account of' the tortfeasor's egregious conduct." Slip op. at 7956. According to the majority in this case, damages are not received "on account of" personal injury "unless they have some compensatory purpose and bear some relationship to the taxpayer's underlying personal injury." Unfortunately, I don't see how the majority can distinguish ADEA liquidated damages from punitive damages. I think this inconsistency merits attention because it demonstrates problems with the majority's approach in both this case and Hawkins.

A. ADEA liquidated damages should really be called double damages because the term liquidated damages is a misnomer. Cf. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 114 (1985) ("[A] 'willful' violation of the ADEA[ ] entitl[es] a plaintiff to "liquidated' or double damages.") (emphasis added). The term "liquidated damages" suggests compensation for damages that are too obscure and difficult to prove. See Brooklyn Sav. Bank v. O'Neill, 324 U.S. 697, 707 (1945). However, ADEA liquidated damages serve an entirely different purpose.

The ADEA provides that its provisions "shall be enforced in accordance with the powers, remedies, and procedures" of the FLSA. 29 U.S.C. § 626(b). However, Congress modified the ADEA remedial provisions in two

important respects. First, the ADEA did not incorporate § 16(a) of the FLSA which criminalizes willful violations. See id. §§ 216(b) & 626(b). Second, liquidated damages are automatically awarded under the FLSA, see id. § 216(b);[1] by contrast, under the ADEA, liquidated damages are only awarded if the violation is willful, see id. § 626(b). Because ADEA liquidated damages replaced the criminal provisions of the FLSA, the Thurston Court concluded, "The legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature." 469 U.S. at 125. Based on Thurston, I think it's clear that ADEA liquidated damages are akin to punitive damages.

Treating ADEA liquidated damages like punitive damages has also been the law of this Circuit since Kelly v. American Standard, Inc., 640 F.2d 974 (9th Cir. 1981). The Kelly court stated: "[T]he award of liquidated damages is in effect a substitution for punitive damages and is intended to deter intentional violations of the ADEA." Id. at 979. In Criswell v. Western Airlines, Inc., 709 F.2d 544, 556 (9th Cir. 1983), aff'd, 472 U.S. 400 (1985), the court upheld an award of both prejudgment interest and liquidated damages under the ADEA because "liquidated damages and prejudgment interest serve different functions in making ADEA plaintiffs whole. "Relying on Kelly, the Criswell court reasoned that liquidated damages are "a substitution for punitive damages" because they are "intended to deter intentional violations of the ADEA." Id. (internal quotations omitted). By contrast, prejudgment interest is intended to compensate for the

[1] The court has discretion to award no liquidated damages or reduced liquidated damages "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the" FLSA. 29 U.S.C. § 260.

loss of use of the money. Id. at 556-57.[2] I don't see how the majority can run away from the clear language in Thurston, Kelly, and Criswell indicating that liquidated damages should be treated like punitive damages.

B. Because the majority held in Hawkins that punitive damages are taxable, a logical application of that rule suggests that ADEA liquidated damages are also taxable. ADEA liquidated damages, like punitive damages, are only awarded in cases of willful violation. ADEA liquidated damages, like punitive damages, are intended to punish and deter.

The majority tries to distinguish ADEA liquidated damages by claiming they "have both a compensatory and a punitive purpose." What compensatory purpose? Under the law of this circuit, ADEA liquidated damages do not compensate for the loss of the use of the money, emotional distress, or pain and suffering. See Criswell, 709 F.2d at 556-57; Cancellier v. Federated Dep't Stores, 672 F.2d 1312, 1318 (9th Cir.), cert. denied, 459 U.S. 859 (1982); Naton v. Bank of California, 649 F.2d 691, 698-99 (9th Cir. 1981). Realistically, what's left to compensate? The majority's suggestion that Congress may have decided that only parties suffering willful discrimination should recover for intangible or incalculable injuries is peculiar. After all, victims of nonwillful violations would suffer the

[2] The Ninth Circuit was the only circuit to adopt this interpretation of ADEA liquidated damages prior to the Supreme Court's decision in Thurston. See, e.g., Powers v. Grinnell Corp., 915 F.2d 34, 39 n.6 (1st Cir. 1990); Lindsey v. American Cast Iron Pipe Co., 810 F.2d 1094, 1102 n.7 (11th Cir. 1987). However, after the Thurston Court held that "Congress intended for [ADEA] liquidated damages to be punitive in inature," see 469 U.S. at 125, two circuits reversed their original positions and embraced the Criswell approach. See Reichman v. Bonsignore, Brignati & Mazzota, P.C., 818 F.2d 278, 281-82 (2d Cir. 1987); Lindsey, 810 F.2d at 1102.

same intangible or incalculable harm. To me, the willfulness requirement clearly suggests a punitive purpose.

In support of its claim that ADEA liquidated damages serve a compensatory purpose, the majority relies heavily on the Conference Report for the 1978 amendments to the ADEA. The Conference Report states that liquidated damages "compensate the aggrieved party for nonpecuniary losses" and that the amended ADEA "does not provide remedies of a punitive nature." H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 13-14, reprinted in 1978 U.S.C.C.A.N. 528, 535. However, the 1978 amendments only provided for a jury trial on the issue of liquidated damages. The Conference Report's comments in 1978—11 years after the passage of the ADEA—are interesting, but shouldn't be given much weight. It's ironic that the majority relies so heavily on subsequent legislative history. In Hawkins, the majority rejected a similar argument because " 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " Hawkins, slip op. at 7959 (quoting United States v. Price, 361 U.S. 304, 313 (1961)). Here, the subsequent legislative history is even less relevant because Congress did not in any way alter the definition or availability of liquidated damages.

More troubling, however, is the majority's statement that "for purposes of § 104(a)(2), the proper inquiry is not the damages' relationship to the tortfeasor, but their relation to the taxpayer." In other words, even if the case law says ADEA liquidated damages are intended to punish the tortfeasor, "from the recipient's perspective," the liquidated damages may still represent compensation for hard-to-calculate losses. I'm not sure I understand the majority's argument. If ADEA liquidated damages are designed to punish the tortfeasor, it shouldn't matter whether the award is viewed from "the recipient's per-

spective." The recipient's thoughts or beliefs are irrelevant. The question should simply be: Why are the ADEA liquidated damages awarded? Based on the case law, I think it's clear that ADEA liquidated damages are awarded to punish the tortfeasor, not compensate the victim.

The majority also believes it's significant that "ADEA liquidated damages . . . bear a relation to the underlying personal injury" because liquidated damages "must equal the plaintiff's total pecuniary loss." But simply doubling the backpay award to compensate for intangible or incalculable injuries seems a rather arbitrary way to compensate victims of discrimination. If the ADEA provided that liquidated damages would be equal to 1000 times the backpay award, the liquidated damages would also "bear a relation to the underlying personal injury" and would increase if the backpay award increased. Under those circumstances, I imagine the majority would say the liquidated damages were clearly punitive. But what's the principle distinguishing the two awards? I'm worried the majority's test may break down into the following rule: large awards (which we may think are excessive) are taxable (e.g., Hawkins), but small awards (which we may think are more reasonable) are not taxable (e.g., this case). As I indicated in Hawkins, I fear this new test may sow more confusion than clarification.

C. If I am correct, the majority should treat ADEA liquidated damages like punitive damages. Based on Hawkins, ADEA liquidated damages should be taxable. Of course, I don't think that's the "right" result, but I think that's the result Hawkins requires. The majority's application of the Hawkins test to this case only reinforces my belief that Hawkins, despite the majority's best intentions, was wrongly decided.

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(2)

No. 94-500

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ERICH E. and HELEN B. SCHLEIER,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

THOMAS F. JOYCE
Counsel of Record
ALAN M. SERWER
BELL, BOYD & LLOYD
70 West Madison Street
Suite 3200
Chicago, Illinois 60602
(312) 372-1121

RAYMOND C. FAY
BELL, BOYD & LLOYD
1615 L Street, N.W.
Washington, D.C. 20036
(202) 466-6300

Attorneys for Respondents

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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QUESTION PRESENTED

Whether age discrimination in violation of the duty imposed by the Age Discrimination in Employment Act of 1967 is a tort-like personal injury, entitling victims to exclude settlement amounts from their gross income as "damages received . . . on account of personal injuries" under Section 104(a)(2) of the Internal Revenue Code.

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BRIEF FOR RESPONDENTS IN OPPOSITION

PRELIMINARY STATEMENT

The lawsuit against United Air Lines, Inc., that Mr. Schleier joined was a class action under the Age Discrimination in Employment Act of 1967 (the "ADEA"). Numerous members of that class action were subsequently challenged by the Commissioner of Internal Revenue with respect to their treatment of settlement amounts on their federal income tax returns. All of these individuals were represented, and continue to be represented, by counsel for Mr. and Mrs. Schleier in this case. These similarly situated, commonly represented individuals are referred to herein as the "Schleier Group."

The Commissioner of Internal Revenue has appealed decisions in favor of various members of the Schleier

Group to the respective United States Courts of Appeals for the Fifth, Seventh, Ninth, Tenth, Eleventh, and Federal Circuits.[1] In two of the decisions that have been reported thus far, the taxpayers are members of the Schleier Group. *See Schmitz* v. *Commissioner*, No. 93-70960 (9th Cir. August 30, 1994), *see* Pet. App.[2] at 78a-96a; *Bennett* v. *United States*, 30 Fed. Cl. 396 (1994), *appeal pending*, No. 94-5107 (Fed. Cir.).

COUNTER-STATEMENT OF THE CASE

In accordance with Rule 24.2, respondents limit their statement to the following clarifications.

1. Respondents agree with petitioner that a conflict now exists among the decisions of the Fifth, Seventh, and Ninth Circuit Courts of Appeals. This conflict extends to the Third and Sixth Circuit Courts of Appeals, to the extent that decisions in those circuits on the tax treatment of ADEA damages antedating *United States* v. *Burke*, 112 S.Ct. 1867 (1992), were not overruled by that case.

2. There is no basis in the record for accepting petitioner's unsubstantiated allegations that the issues in this case "affect many thousands of individuals who have received, *or will receive in the future*, damage awards under the ADEA and other state and federal statutory schemes,"

[1] In the cases of several members of the Schleier Group whose cases are being held in abeyance by the Tax Court, any appellate review would lie before the United States Courts of Appeals for the First and Second Circuits. *See McIver* v. *Commissioner*, No. 8814-90 (U.S. Tax Court), and *Clifford* v. *Commissioner*, No. 105-93 (U.S. Tax Court).

[2] References to "Pet. App." are to the Appendix attached to the Petition for A Writ of Certiorari.

Petition at 9 (emphasis added), or that the question in this case "affects countless individuals who have received, *or will receive*, monetary remedies under the ADEA and other state and federal statutory schemes," Petition at 16 (emphasis added). The applicability of the result in this case beyond the Schleier Group and the husband and wife in *Downey* v. *Commissioner*, 97 T.C. 150 (1991), *supp. op.*, 100 T.C. 634 (1993), *rev'd*, No. 93-3763 (7th Cir. August 30, 1994), is speculative. As to the possibility of other, comparable lawsuits, it is conjectural whether age discrimination actions spawning tax disputes will increase or whether they will decrease, inasmuch as federal tax cases have arisen out of only a minuscule number of all ADEA actions brought to date.[3] Any other cases raising the same issue of law as that of Mr. and Mrs. Schleier are limited to taxable years (i) before the effective date of the amendment by the Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7641(a), 103 Stat. 2379, (ii) for which the statute of limitations has not yet expired.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS CORRECTLY APPLIES THE STANDARDS SET FORTH IN *UNITED STATES* v. *BURKE*, AND THEREFORE PRESENTS NO ISSUE WARRANTING REVIEW.

Even in cases involving conflicting decisions among circuit courts of appeals, the acceptance of jurisdiction by the Supreme Court is an act of discretion. Rule 10.1.

[3] The first tax case applying Section 104(a)(2) to ADEA damages did not arise until two decades after the enactment of the ADEA. *See Rickel* v. *Commissioner*, 92 T.C. 510 (1989), *rev'd in part*, 900 F.2d 655 (3d Cir. 1990).

1. The petitioner implicitly argues that all decisions on the tax treatment of ADEA damages rendered before *United States* v. *Burke* are no longer good law. *See Rickel* v. *Commissioner*, 92 T.C. 510 (1989), *rev'd in part*, 900 F.2d 655 (3d Cir. 1990), *Pistillo* v. *Commissioner*, 912 F.2d 145 (6th Cir. 1990), and *Redfield* v. *Insurance Company of North America*, 940 F.2d 542 (9th Cir. 1991). However, in *Purcell* v. *Seguin State Bank & Trust Co.*, 999 F.2d 950 (5th Cir. 1993), the Fifth Circuit Court of Appeals relied upon this line of cases. *Accord*, *Schmitz*; *Bennett*. In *Reese* v. *United States*, 24 F.3d 228 (Fed. Cir. 1994), the Court of Appeals for the Federal Circuit cited and applied *Pistillo* and *Redfield* in order to distinguish exclusively punitive damages from damages that have a compensatory function. The majority opinion in *Burke* cited *Rickel* with apparent approbation and without qualification,[4] showing that the Court did not perceive itself as overruling that case. The decision of the court below continues the pre-*Burke* line of Section 104(a)(2) ADEA cases epitomized by *Rickel*, *Pistillo*, and *Redfield*.

2. Exclusion of age discrimination proceeds from gross income is consistent with *United States* v. *Burke*. That case harmonized the language of the Treasury Regulations ("tort or tort-type rights," 26 C.F.R. § 1.104-1(c)), with the words of the statute ("damages received . . . on account of personal injury," 26 U.S.C. § 104(a)(2)), by emphasizing the importance of a tort-like remedial scheme even in instances where "grave harm" to victims of discrimination may be presumed. 112 S.Ct. at 1872. *Burke* distilled two factors as a test of the essential elements of a personal injury action under Section 104(a)(2): (i) the

[4] *See* 112 S.Ct. 1871, n. 6.

spectrum of possible recoveries must include some redress that does more than restore the victim's lost wages, and (ii) the fact-finding process must provide the opportunity for a trial by jury.

The ADEA combines compensatory and punitive elements from the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"), including the provision for liquidated damages, which had previously been interpreted by this Court to connote "damages too obscure and difficult of proof for estimate other than by liquidated damages." *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 707 (1945) (citations omitted; emphasis added); *see, also, Overnight Motor Transp. Co., Inc.* v. *Missel*, 316 U.S. 572, 583-584 (1942). Using the FLSA as a model, Congress enacted the ADEA liquidated damage remedy in part[5] as a legislative substitute for a range of damages that were presumed to exist in individual cases but that—unlike the company-wide policy of discrimination in the instant case—could be proven only by prosecuting separate lawsuits on behalf of each of the affected victims. In contrast to the pre-1991 damages available under Title VII, which were confined to back pay, these additional damages from the perspective of the victim of age discrimination satisfy the *Burke* court's requirement for a range of damages beyond lost wages. *See Schmitz*, Pet. App. at 87a.

[5] As this Court recognized in *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 125-126 (1985), although liquidated damages under the FLSA were exclusively compensatory, Congress created a punitive role for liquidated damages under the ADEA by not carrying over the criminal sanctions from the FLSA into the ADEA and by allowing the double damage liability and its standard of willful violation to deter wrongdoers. However, the dual role of ADEA liquidated damages does not stand in the way of their satisfying the *Burke* test. *See Schmitz*, Pet. App. at 88a-89a.

The second factor highlighted by the Supreme Court in *Burke* is beyond question. Unlike Title VII before the 1991 amendments, the ADEA provides a right to jury trials. 29 U.S.C. § 626(c).

3. The *Downey* decision, on which petitioner relies, did not even mention the role of jury trials in *Burke*. In contrast, other post-*Burke* courts that have considered this issue have taken the Court's repeated references to jury trials more seriously. In so doing, they have concluded that the availability of jury trials under the ADEA is an additional consideration weighing in favor of the exclusion of ADEA damages. *See Schmitz*; *Bennett*.

The approach of the Seventh Circuit Court of Appeals under the ADEA is as flawed as its position under the Internal Revenue Code. Despite the clear teaching of this Court in *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985), the appeals court stated as the partial basis for its reversal of the Tax Court:

> This court adheres to the position that ADEA liquidated damages replace prejudgment interest.

Downey, Pet. App. at 76a. Such an exclusively compensatory interpretation cannot be reconciled with the conclusion of the Supreme Court in *Thurston*, where it was held that ADEA liquidated damages play a punitive role for purposes of the standard of willfulness under the ADEA.

By contrast, the Ninth Circuit Court of Appeals, whose decision in *Criswell* v. *Western Airlines Inc.*, 709 F.2d 544 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400 (1985), anticipated the conclusion of this Court in *Thurston*, recently emphasized in *Schmitz* that damages under the ADEA have a dual role, when considered comprehensively from the standpoints of the tortfeasor and the victim. *See Schmitz*, Pet. App. at 88a-89a. The compensatory rule of

ADEA liquidated damages from the perspective of the victim satisfies *Burke*'s need for a tort-like breadth of remediation. *Id.*

Given that the *Downey* case is the only appellate decision in conflict with the holdings in the Third, Fifth, Sixth, and Ninth Circuits, it is also questionable whether the issue has sufficiently ripened for review by the Supreme Court.

II.

THE SUPREME COURT SHOULD DECLINE TO ADOPT THE COMMISSIONER'S LITIGATING POSITION UNDER SECTION 104(A)(2) AS A BASIS FOR GRANTING CERTIORARI AS LONG AS THE COMMISSIONER FAILS TO FORMALIZE HER POSITION THROUGH RULEMAKING OR OTHER APPROPRIATE ADMINISTRATIVE PROCEEDINGS.

In the interest of judicial economy, it is not appropriate to resort to a case-by-case adjudication through prolonged circuit conflict, if the litigating agency can streamline the process through unilateral administrative practice.

There are currently at least three separate interpretations of Section 104(a)(2) emanating from the Internal Revenue Service. The first is the view of the Treasury Regulations, promulgated almost forty years ago and never modified in this respect, which link the existence of a personal injury to the presence of "tort or tort-type rights." 26 C.F.R. § 1.104-1(c). The second is the administrative interpretation set forth in Rev. Rul. 93-88, 1993-41 I.R.B. 4, which attempts to apply the *Burke* framework to Title VII of the Civil Rights Act of 1964, as amended in 1991, 42 U.S.C. § 2000e *et seq.*, to 42 U.S.C. § 1981, and to the Americans With Disabilities Act, 42 U.S.C. §§ 12101-12213. The third is the litigating position of the Commissioner

in the *Schleier*, *Downey*, and *Schmitz* cases. However, petitioner's litigating position cannot easily be reconciled with her administrative position, or with the absence of clarifying regulations.

Any suggestion that *Burke* precludes extension of the Section 104(a)(2) exclusion to statutes that redress economic injuries conflicts with Revenue Ruling 93-88, which accorded tax-free treatment to those components of a damage payment that by definition do nothing other than compensate for back pay:

> Compensatory damages, including back pay, received in satisfaction of a claim of disparate treatment gender discrimination under Title VII . . . as amended in 1991, are excludable from gross income as damages for personal injury . . . *even if the compensatory damages in such a case are limited to back pay.*

See 1993-41 I.R.B. at 5 (emphasis added). Indeed, even traditional tort compensation consisting of back pay or lost wages would be taxable under the suggestion that remedies redressing economic injuries fall outside the exclusion of Section 104(a)(2). The litigating theory of the petitioner would then be at odds with the regulation's rationale of "tort or tort-type rights," which has been interpreted to allow exclusion for lost wages or other economic losses. *Threlkeld* v. *Commissioner*, 87 T.C. 1294 (1986), *aff'd*, 848 F.2d 81 (6th Cir. 1988).

Petitioner's position in this case would also suggest a bifurcation of damage awards between taxable and nontaxable components, reminiscent of the dichotomy between "professional" and "personal" damages that was rejected by *Roemer* v. *Commissioner*, 716 F.2d 693 (9th Cir. 1983), and *Threlkeld* v. *Commissioner*, *supra*, both of which were cited by the *Burke* majority. *See* 112 S.Ct. at 1871,

n. 6. However, bifurcation has been rejected by the Internal Revenue Service. *See* Rev. Rul. 93-88, *supra*, at 5.

"Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 213 (1988). In the instant case, the various positions of the agency do not represent a coherent legal theory that will assist courts in resolving the cases of those individuals who have received, or will receive, monetary remedies under the ADEA and other state and federal statutory schemes. On the contrary, they are mutually inconsistent and provide no stable platform from which to apply the law.[6] If the Commissioner is serious in wishing to provide innumerable taxpayers with guidelines for applying the doctrine of *Burke*, she can take the first step by promulgating regulations in accordance with the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, supplemented as appropriate by administrative announcements.[7] Until that happens, this Court should decline petitioner's invitation to displace the regulatory and administrative process by granting certiorari on the basis of a litigating position of the Commissioner that has been adopted for this case.

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[6] The petitioner's conception of liquidated damages also displays a lack of coherence. In support of the proposition that "Liquidated damages are not a tort remedy; they are an ordinary remedy for breach of contract," the petition cites *Rex Trailer Co.* v. *United States*, 350 U.S. 151 (1956). Petition at 13, n. 9. However, that case arose under the Surplus Property Act of 1944 and has nothing to do with either the FLSA or the ADEA. Any similarity begins and ends in the names of the remedies.

[7] Five years after the 1989 amendment to Section 104(a)(2) made by the Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7641(a), 103 Stat. 2379, no form of administrative guidance on its new standard has been issued.

III.

THE ISSUE IN THIS CASE, WHICH AROSE UNDER PRE-1989 TAX LAW, MAY BE LIMITED ONLY TO OPEN TAX YEARS BEFORE THE AMENDMENT TO SECTION 104(A)(2) ENACTED BY THE OMNIBUS BUDGET RECONCILIATION ACT OF 1989, THEREBY HAVING LITTLE CONTINUING SIGNIFICANCE.

Petitioner asks the Court to provide, among other things, prospective guidance for taxpayers who will be subject to Section 104(a)(2) as it was amended by the Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7641(a), 103 Stat. 2379. Petition at 16. Yet, as petitioner concedes, "[t]he proper interpretation of the 1989 amendment is . . . not at issue in the present case, which . . . involves [a] tax return which preceded the 1989 amendment." Petition at 14, n. 10. Moreover, if the Court decides Mr. and Mrs. Schleier's case in a way that does not reach beyond the pre-1989 statute, petitioner's need for prospective guidance disappears as a justification for granting certiorari.

The amendment to Section 104(a)(2) adopted in 1989 started out as a more comprehensive provision that would have taxed all damages in nonphysical injury cases, whether punitive or compensatory. *See* H.R. Rep. No. 101-247, 101st Cong., 1st Sess. at 1354-1355, *reprinted in* 1989 U.S. Code, Cong. & Admin. News at 2824-25. However, the bill that emerged from conference, which is reflected in current Section 104(a)(2), resolved only the tax treatment of "punitive damages in connection with a case not involving physical injury or physical damage." 26 U.S.C. § 104(a)(2).

The characterization of personal injury damages as "punitive" is not necessarily dispositive or even relevant under the pre-1989 version of Section 104(a)(2) applicable to Mr.

and Mrs. Schleier. *Compare Horton* v. *Commissioner*, No. 93-1928 (6th Cir. August 29, 1994) (punitive damages in tort case, held excludable under Section 104(a)(2)), *with Hawkins* v. *Commissioner*, No. 93-15828 (9th Cir. July 19, 1994) (punitive damages in tort case, held not excludable), *and Reese* v. *United States*, 24 F.3d 228 (Fed. Cir. 1994) (punitive damages in tort case, held not excludable). If this Court grants the petition, it is conceivable that it could resolve the pre-1989 tax treatment of age discrimination damages by finding that, irrespective of whether ADEA liquidated damages are exclusively punitive, the ADEA remedial framework is still sufficiently tort-like to bring ADEA damages within the scope of the Section 104(a)(2) exclusion.

The petitioner seems to be dissatisfied with the majority opinion in *Burke* because this Court did not adopt a broad, quasi-regulatory rule that would dispose of cases beyond the Title VII dispute then at issue. Apparently also dissatisfied with the limited scope of the 1989 amendment to Section 104(a)(2), petitioner has pursued the individual members of the Schleier Group in as many circuits as are necessary to create a conflict. Coordinated, circuit-directed litigation against a national group is almost guaranteed to produce a conflict among courts.[8]

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[8] The demographic spread of the Schleier Group permits a determined appellant to use this Court as an alternative to legislative amendment. If "p" represents the probability that an appellate court will affirm the lower court, then the probability of appellant's succeeding in creating a circuit conflict is "$1 - p^{12} - (1 - p)^{12}$," assuming access to 12 circuit courts of appeals and further assuming independence of courts. *See* Feller, *Introduction to Probability Theory and Its Applications*, v. 1, at 27 (3d ed. 1968). Even if p were as high as .9, representing a very strong pre-disposition to rule in favor of the appellee-taxpayer, an appellant with resources and opportunity could pursue the issue in all circuits with a probability in excess of 70% of creating a conflict.

Rejecting invitations to judicial activism in other contexts, this Court has recognized that the more responsible course may be to refrain from remaking the law, thereby inviting Congressional action on a problem of nationwide significance. *See, e.g., Quill Corp.* v. *North Dakota*, 112 S.Ct. 1904, at 1916 (1992) (footnote omitted): "[T]he underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve." The Court should exercise a similar restraint here, where Congress is better poised to adopt guidance of a prospective nature, on which future taxpayers may rely in settling their lawsuits.

In the alternative, if the Commissioner does not want to wait for Congressional or regulatory clarification in this area, but wishes to secure a judicial decision, then the more efficient test case to provide prospective guidance is not Mr. and Mrs. Schleier's, which arose under pre-1989 law, but a set of facts governed by the current statute.

CONCLUSION

The Petition sets forth no compelling basis for review by this Court, since the Fifth Circuit's disposition, as amplified by the Ninth Circuit in *Schmitz* v. *Commissioner*, is consistent with previous decisions of this Court, while *Downey* v. *Commissioner* is demonstrably inconsistent. In addition, giving any consideration to the litigating position presented by the Commissioner of Internal Revenue in the Schleier Group cases (or in other pending pre-1989 cases) is inappropriate until the Commissioner of the Internal Revenue Service has removed any possible incon-

sistencies in her various administrative positions or Congress has enacted clear guidelines. The Petition should be denied.

Respectfully submitted,

THOMAS F. JOYCE
Counsel of Record
ALAN M. SERWER
BELL, BOYD & LLOYD
70 West Madison Street
Suite 3200
Chicago, Illinois 60602
(312) 372-1121

RAYMOND C. FAY
BELL, BOYD & LLOYD
1615 L Street, N.W.
Washington, D.C. 20036
(202) 466-6300

Attorneys for Respondents

October 21, 1994

No. 94-500

In the Supreme Court of the United States

OCTOBER TERM, 1994

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ERICH E. AND HELEN B. SCHLEIER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

In the Supreme Court of the United States

OCTOBER TERM, 1994

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REPLY BRIEF FOR THE PETITIONER

Respondents acknowledge (Br. in Opp. 2) that a conflict exists among the courts of appeals on the precise question presented in this case. Compare *Downey* v. *Commissioner*, Pet. App. 70a-77a (pet. for reh'g filed Sept. 13, 1994), with *Schleier* v. *Commissioner*, Pet. App. 68a-69a, and *Schmitz* v. *Commissioner*, Pet. App. 78a-96a. These three circuits have expressly disagreed over the correct application of this Court's analysis in *United States* v. *Burke*, 112 S. Ct. 1867 (1992), to the specific question presented in this case—whether backpay and liquidated damages received under the Age Discrimination in Employment Act are excluded from gross income under Section 104(a)(2) of the Internal Revenue Code.

While acknowledging that this plain conflict exists among the courts of appeals, respondents nonetheless contend that further review in this case is not warranted. They assert (i) that it is "speculative" whether anyone other than the parties to the underlying United Airlines ADEA settlement would be affected by the issues addressed here (Br. in Opp. 3), (ii) that the issue should be resolved prospectively by regulations (*id.* at 7-9) and (iii) that the question presented in this case will be controlled in the future by a 1989 amendment to the statute (*id.* at 10-12). None of the rationales offered by respondents undermines the need for this Court's resolution of the recurring conflict that this case presents.

1. There is nothing "speculative" about the fact that large numbers of ADEA payments, often involving large sums, are made each year. As neutral commentators have noted, the question addressed in this case is "an incredibly important issue because huge amounts of money are being paid out" in age discrimination cases. Wall Street Journal, Oct. 19, 1994, at A-1. Moreover, the legal issue presented in this case has importance not only for ADEA recoveries but also for other state and federal statutory recoveries that provide backpay and liquidated damages but which provide no compensation for "traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other consequential damages" (*United States* v. *Burke*, 112 S. Ct. at 1873-1874).[1] Unless the conflict among the circuits is resolved, recipients of

[1] For example, the Equal Pay Act and the Fair Labor Standards Act are similar to the ADEA in this respect. See, *e.g.*, *Bennett* v. *Commissioner*, 67 T.C.M. (CCH) 2817 (1994), appeal pending, No. 94-2009 (6th Cir.).

statutory remedies under the ADEA, and under like statutes, will continue to receive disparate tax treatment based solely upon the happenstance of geography.[2]

2. Respondents' suggestion (Br. in Opp. 7-9) that the Commissioner should resolve the issue presented in this case prospectively by adopting a new regulation interpreting the scope of Section 104(a)(2) provides no basis for declining review of the admitted conflict among the circuits. In the face of conflicting appellate decisions, the deference that would be received by a new regulation reinterpreting the same statutory language is, at best, uncertain. Moreover, even if such a regulation were issued in the future, it could not obtain equal treatment for the various litigants now before the Court, whose claims have been resolved inconsistently by the lower courts.

3. In 1989, Congress amended Section 104(a)(2) of the Code to provide that "punitive damages in connection with a case not involving physical injury or physical sickness" are not excluded from income. 26 U.S.C. 104(a)(2) (1988 & Supp. IV 1992). That amendment does not resolve the question whether back pay and liquidated damages received under the ADEA are excludable from income: (i) backpay, of course, is not a "punitive" damage and (ii) ADEA liquidated damages, whether regarded as

[2] Respondents erroneously describe the Commissioner's evenhanded treatment of all parties to the United Airlines ADEA settlement as "[c]oordinated, circuit-directed litigation" designed "to produce a conflict among courts" (Br. in Opp. 11). The Commissioner is not accountable either for the fact that the question presented in this case has a national character or for the fact that the circuits have reached differing views of its proper disposition. The Commissioner's litigating position in these cases reflects her institutional responsibility to obtain proper and evenhanded treatment of all taxpayers.

"punitive" or not, are awarded to deter "willful violations" of the ADEA (29 U.S.C. 626(b)) and are not awarded "on account of" any personal injury, as the statute requires for the exclusion from income to be available. 26 U.S.C. 104(a)(2). See Pet. 14-16 & n.10.

The conflict on the frequently recurring questions presented in this case is not rendered moot prospectively by the 1989 amendment. Further review by this Court is therefore required to avoid continuing uncertainty and uneven application of the revenue laws.

For the foregoing reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

NOVEMBER 1994

No. 94-500

In the Supreme Court of the United States

OCTOBER TERM, 1994

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

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DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

KENT L. JONES
Assistant to the Solicitor General

ANN B. DURNEY
EDWARD T. PERELMUTER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether back pay and liquidated damages received in settlement of litigation under the Age Discrimination in Employment Act of 1967 are excluded from gross income under Section 104(a)(2) of the Internal Revenue Code as "damages received * * * on account of personal injuries or sickness" (26 U.S.C. 104(a)(2)).

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-500

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ERICH E. AND HELEN B. SCHLEIER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 68a-69a) is unpublished, but the decision is noted at 26 F.3d 1119 (Table). The opinion of the Tax Court (Pet. App. 64a-65a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1994. The petition for a writ of certiorari was filed on September 19, 1994, and was granted on

November 14, 1994. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 61(a) of the Internal Revenue Code, 26 U.S.C. 61(a), provides in relevant part:

> Except as otherwise provided in this subtitle, gross income means all income from whatever source derived.

2. Section 104(a) of the Internal Revenue Code, 26 U.S.C. 104(a) (1988 & Supp. V 1993), provides in relevant part:

> Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—
>
> * * * * *
>
> (2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness;
>
> * * * * *

3. Section 104-1(c) of the Treasury Regulations, 26 C.F.R. 1.104-1(c), provides:

> Section 104(a)(2) [of the Internal Revenue Code] excludes from gross income the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness. The term "damages received (whether by suit or agreement)" means an amount received (other than workmen's compensation) through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution.

STATEMENT

1. Respondent Erich E. Schleier is a former employee of United Airlines, Inc.[1] Pursuant to an established policy of United Airlines, respondent's employment was terminated when he reached the age of sixty (Tax Ct. Pet. 2-3). Respondent thereafter filed a complaint in federal district court alleging that his termination violated the Age Discrimination in Employment Act of 1967 (ADEA), which (with exceptions not relevant here) makes it "unlawful for an employer * * * to discharge any individual * * * because of such individual's age" (29 U.S.C. 623(a)(1)). The remedies for an unlawful discharge under the ADEA include reinstatement, back pay, injunctive and declaratory relief and attorneys fees. See 29 U.S.C. 626(b); 29 U.S.C. 216(b), 217. The ADEA also authorizes an additional award of "liquidated damages" in an amount equal to the backpay award "in cases of willful violations" of that Act. 29 U.S.C. 626(b).

Respondent's complaint was consolidated within a class action suit against United Airlines. On June 30, 1986, the class action was settled under an agreement providing for monetary payments to the class members. One half of the settlement payment was attributed to "back pay"; the other half of the payment was attributed to "liquidated damages." As a result of the settlement, respondent received "back

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[1] Respondent's wife Helen is a party to this case solely because the couple filed a joint return during the year in question.

pay" of $72,814.50 and "liquidated damages" in the same amount (Tax Ct. Pet. 4-5).

Respondent reported the "back pay" as income on his 1986 tax return. He did not, however, report the "liquidated damages" that he received under the settlement. The Commissioner of Internal Revenue issued a notice of deficiency to respondent, asserting that the liquidated damages were improperly excluded from his income, resulting in a deficiency of $35,918.50 in respondent's income tax for 1986 (Tax Ct. Pet. 2).

2. Respondent commenced this case in Tax Court to obtain a redetermination of the asserted deficiency. The petition alleged that the liquidated damages portion of the settlement payment was properly excluded from gross income under Section 104(a)(2) of the Internal Revenue Code, which provides that "gross income does not include" (26 U.S.C. 104(a)(2))

> the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness.

The petition further alleged that the "back pay" portion of the settlement payment, which had been reported as income on respondent's 1986 return, was also excludable from gross income under Section 104(a)(2). Respondent therefore sought a determination of overpayment (as authorized by 26 U.S.C. 6512(b)).

a. Proceedings on respondent's case were deferred pending the Tax Court's disposition of the lead case relating to the United Airlines class action settlement, *Downey* v. *Commissioner*, 97 T.C. 150 (1991), supplemental opinion, 100 T.C. 634 (1993), rev'd, 33 F.3d 836 (7th Cir. 1994), petition for cert. pending, No. 94-999 (filed Dec. 5, 1994).

In its original opinion in *Downey*, the Tax Court (in a reviewed opinion with six judges dissenting in part) held that back pay and liquidated damages received under the ADEA are excludable from gross income under Section 104(a)(2). With respect to back pay, the Tax Court expressly adopted (Pet. App. 21a-24a) the reasoning of *Rickel* v. *Commissioner*, 900 F.2d 655 (3d Cir. 1990), and *Pistillo* v. *Commissioner*, 912 F.2d 145 (6th Cir. 1990), which held that backpay awards under the ADEA are excludable from gross income because (i) an ADEA suit alleges a violation of duty that arises by operation of a statute and not by virtue of a contract and (ii) statutes addressing discrimination in the workplace had been characterized by other courts as involving personal injury. 900 F.2d at 662-663; 912 F.2d at 149-150.

With respect to liquidated damages, the Tax Court in *Downey* rejected the Commissioner's contention that ADEA liquidated damages—like punitive damages—are paid because of the employer's willful misconduct, rather than "on account of personal injuries" (26 U.S.C. 104(a)(2)) to the employee, and are therefore not excludable from gross income under the plain language of the statute. Pet. App. 26a. See *Commissioner* v. *Miller*, 914 F.2d 586, 589-591 (4th Cir. 1990). The Tax Court held that, while ADEA liquidated damages serve a punitive purpose, these damages, when viewed from the victim's perspective, represent compensation for nonpecuniary losses. Pet. App. 26a-29a.

b. The Tax Court withheld entry of its final decision in *Downey* pending this Court's decision in *United States* v. *Burke*, 112 S. Ct. 1867 (1992). In *Burke*, this Court held that backpay awards received in settlement of litigation under the pre-1991 version

of Title VII of the Civil Rights Act of 1964 are not excludable from gross income under Section 104(a)(2). In reaching that conclusion, the Court emphasized that a statute "whose sole remedial focus is the award of backwages" (112 S. Ct. at 1874) does not represent a tort-like remedy of a personal injury but instead represents redress for "legal injuries of an economic character" (*id.* at 1873, quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975)). The Court concluded that a backpay remedy that redresses an economic injury is "not excludable from gross income as 'damages received . . . on account of personal injuries' under § 104(a)(2)." 112 S. Ct. at 1874.

After this Court issued its decision in *Burke*, the Tax Court granted the Commissioner's motion for reconsideration of the *Downey* decision. In a supplemental opinion in *Downey* (with several separate opinions), the Tax Court emphasized that one of the hallmarks of tort liability is the availability of a broad range of damages to compensate the victim, as well as punitive damages when the defendant's conduct was intentional or reckless. Pet. App. 42a. The Tax Court observed that in contrast to the pre-1991 version of Title VII involved in *Burke* (which limited the available remedies to back pay and equitable relief, see 112 S. Ct. at 1872-1874 & nn.8, 12), the ADEA provides "a range of remedies, including both unpaid wages and 'liquidated damages.'" Pet. App. 44a. The Tax Court concluded that the ADEA "evidences a tort-like conception of injury and remedy" because liquidated damages under the ADEA compensate the victim of age discrimination for nonpecuniary losses and also serve a deterrent or punitive purpose. *Id.* at 45a. The Tax Court therefore reaffirmed its prior holding in *Downey* that all damages received in ADEA litigation are excludable from gross income under Section 104(a)(2). Pet. App. 45a.

On July 7, 1993, the Tax Court entered an order in the present case granting respondent's motion for summary judgment based on the court's ruling in *Downey*. Pet. App. 64a-65a.

3. The Commissioner appealed from the Tax Court's ruling in this case and in *Downey*. While these appeals were pending, the Fifth Circuit endorsed and adopted the Tax Court's decision in *Downey* in the course of addressing a damages issue in private ADEA litigation in which the United States was not a party and did not participate. *Purcell* v. *Seguin State Bank & Trust Co.*, 999 F.2d 950, 961 (1993).[2] The court in *Purcell* agreed with the Tax Court's reasoning that "ADEA claims are tort-like and that an entire ADEA award is nontaxable." *Ibid.*

a. Because the Fifth Circuit had recently endorsed the Tax Court's *Downey* decision in *Purcell*, the Commissioner filed a suggestion that the appeal in respondent's case be heard *en banc*. The Fifth Circuit rejected that suggestion. Pet. App. 67a. The three-judge panel assigned to this case then entered a decision in favor of respondent solely on the authority of *Purcell*. Pet. App. 68a-69a.

b. On the Commissioner's appeal from the *Downey* decision, the Seventh Circuit reversed the Tax

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[2] In *Purcell*, the court concluded that an ADEA backpay award should not be increased to take account of the employee's income tax liabilities because, under the Tax Court's ruling in *Downey*, the ADEA award would not be subject to tax under Section 104(a)(2) of the Code. See 999 F.2d at 961.

Court, holding that ADEA backpay and liquidated damages awards are *not* excluded from income under Section 104(a)(2). *Downey* v. *Commissioner*, 33 F.3d 836, petition for cert. pending, No. 94-999 (filed Dec. 5, 1994). The Seventh Circuit reasoned that (33 F.3d at 839):

> *Burke* stands for the proposition that a federal anti-discrimination statute must provide compensatory damages for intangible elements of personal injury (such as pain and suffering, emotional distress, or personal humiliation) to constitute a tort-type personal injury and receive tax-exempt treatment under § 104(a)(2).

The court noted that the only damages remedies under the ADEA are back pay and liquidated damages and that neither of these remedies "compensate for the intangible elements of a personal injury." 33 F.3d at 840. Because the limited remedies available under the ADEA thus lack "an essential element of a tort-type claim," the Seventh Circuit concluded that, under this Court's analysis in *Burke*, the damages awarded under the statute "cannot be excluded from taxation under § 104(a)(2)." 33 F.3d at 840.

c. In an appeal involving a different party to the United Airlines settlement, the Ninth Circuit affirmed a Tax Court decision based upon *Downey*. *Schmitz* v. *Commissioner*, 34 F.3d 790 (1994), petition for cert. pending, No. 94-944 (filed Nov. 23, 1994). In *Schmitz*, the Ninth Circuit agreed with the Tax Court that the ADEA represents a "tort-like" cause of action, reasoning that the "ADEA's liquidated damages provision, as well as its provision for jury trials, distinguishes ADEA from the statute discussed in *Burke*." 34 F.3d at 793. The court of appeals concluded that ADEA recoveries are therefore excluded from tax under Section 104(a)(2).

In *Schmitz*, the Ninth Circuit also rejected the Commissioner's additional contention that, if ADEA represents a "tort-type" recovery for a personal injury, the liquidated damages component of that recovery would be subject to tax in any event because it does not represent an award "on account of personal injuries" (26 U.S.C. 104(a)(2)) but is instead a penalty "on account of" the employer's willful misconduct. 34 F.3d at 794-796. The court stated that liquidated damages under the ADEA are compensatory rather than punitive—because they are designed to "compensate victims for damages which are too obscure and difficult to prove" (*id.* at 794)—and are therefore excluded from tax under Section 104(a)(2).

SUMMARY OF ARGUMENT

Section 104(a)(2) of the Internal Revenue Code provides that gross income does not include "the amount of any damages received (whether by suit or agreement * * *) on account of personal injuries or sickness." In *United States* v. *Burke*, 112 S. Ct. 1867 (1992), this Court held that Section 104(a)(2) applies only when the underlying cause of action that led to the taxpayer's recovery provides compensation for the "personal," as well as "economic," components of the taxpayer's injury. The Court concluded that a cause of action that does not compensate for the traditional harms associated with personal injuries—such as pain and suffering, emotional distress, and harm to reputation—does not yield "damages * * * on account of personal injuries" within the exclusion from gross income provided by Section 104(a)(2).

The interpretation of Section 104(a)(2) adopted by the Court in *United States* v. *Burke* governs, and disposes of, the issues in this case. Even though discrimination based upon age can effect "personal" injuries, back pay awarded under the ADEA provides compensation only for the economic, and not the personal, components of that injury. The ADEA provides no remedy for the traditional harms associated with a "personal injury," such as pain and suffering, emotional distress and harm to reputation. The award of back pay under the ADEA thus does not compensate for "damages * * * on account of personal injuries" under this Court's decision in *Burke*.

The availability of liquidated damages under the ADEA does not alter this result for two reasons. First, liquidated damages under the ADEA do not compensate the employee for the traditional elements of personal injury, such as pain and suffering and emotional distress. Liquidated damages under the ADEA are an enforcement mechanism to deter "willful violations" of the Act; they are not available as, and do not provide, compensation for the personal elements of the employee's injury. The availability of liquidated damages under the ADEA thus does not convert the backpay award into "damages * * * on account of personal injuries." Second, liquidated damages cannot themselves be excluded from gross income under Section 104(a)(2) because such damages are awarded "on account of" the employer's willful misconduct, not "on account of personal injuries." Liquidated damages, like punitive damages in an ordinary tort suit, are therefore not excluded from gross income under the plain language of the statute.

ARGUMENT

BACK PAY AND LIQUIDATED DAMAGES RECEIVED IN SETTLEMENT OF LITIGATION UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 ARE NOT EXCLUDED FROM GROSS INCOME UNDER SECTION 104(a)(2) OF THE INTERNAL REVENUE CODE AS "DAMAGES RECEIVED * * * ON ACCOUNT OF PERSONAL INJURIES OR SICKNESS"

The first step in calculating taxable income under the Internal Revenue Code is to determine the taxpayer's "gross income." Section 61(a) provides that, subject to specific exclusions set forth elsewhere in the Code, "gross income means all income from whatever source derived." This sweeping statutory definition broadly reflects the Legislature's intent to exert the full measure of its taxing power. *United States* v. *Burke*, 112 S. Ct. 1867, 1870 (1992). Any funds or other "accessions to wealth" (*Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 430-431 (1955)) received by a taxpayer represent "gross income" unless the taxpayer establishes that the income falls within one of the specific exclusions created by other sections of the Code.

It is not disputed that the payment received by respondent in settlement of his age-discrimination suit under the Age Discrimination in Employment Act of 1967 (ADEA) represents an "accession to wealth" that constitutes "gross income" within the broad scope of Section 61(a). The question presented in this case is whether that payment is excluded from "gross income" by Section 104(a)(2) of the Code, which provides that "gross income does not include * * * the amount of any damages received (whether by suit or agreement * * *) on account of personal injuries or sickness." 26 U.S.C. 104(a)(2). As an

exclusion from gross income, Section 104(a)(2) is to be narrowly construed. *United States* v. *Centennial Savings Bank*, 499 U.S. 573, 583-584 (1991). See also *United States* v. *Burke*, 112 S. Ct. at 1876 (Scalia, J., concurring); *id.* at 1878 (Souter, J., concurring).

A. Section 104(a)(2) Authorizes An Exclusion From Income Only For Damages Received On Account Of Personal Injuries Or Sickness

The statutory phrase—"damages received * * * on account of personal injuries"—is not explained in the text of the statute or in its legislative history. *United States* v. *Burke*, 112 S. Ct. at 1870. As this Court has noted, the term "personal injuries" is susceptible of more than one interpretation. See *id.* at 1871-1872 n.6; *id.* at 1875 (Scalia, J., concurring).[3] In *United States* v. *Burke*, however, the

[3] The lineage of Section 104(a)(2) is as ancient as the modern income tax. The statute was first enacted as Section 213(b)(6) of the Revenue Act of 1918, ch. 18, 40 Stat. 1066 (1919). The Internal Revenue Service originally interpreted the statute to apply only to damages recovered in connection with physical injuries. See Sol. Mem. 1384, 2 C.B. 71 (1920); Sol. Op. 132, I-1 C.B. 92, 93 (1922). In 1972, however, the Service acquiesced in the Tax Court's decision in *Seay* v. *Commissioner*, 58 T.C. 32 (1972), which held that damages from nonphysical personal injuries are also excluded from gross income under the statute. See 1972-2 C.B. 3. See also Rev. Rul. 74-77, 1974-1 C.B. 33 (compensation for alienation of affections excluded from gross income under the statute).

The origin of Section 104(a)(2), and the lengthy history of its administration, are discussed in detail in the government's brief in *United States* v. *Burke*, No. 91-42, at 10-15. In *Burke*, the Court considered this history and concluded that the statutory term "'personal injuries' encompasses, in accord with common judicial parlance and conceptions, * * *

Court reviewed the lengthy history of the statute and its administration and adopted an interpretation of Section 104(a)(2) that governs, and disposes of, the issues presented in this case.

1. In *Burke*, the Court held that an award of back pay under the pre-1991 version of Title VII of the Civil Rights Act did not constitute "damages received * * * on account of personal injuries or sickness." The Court did not doubt that discrimination in violation of Title VII effects a "personal" injury (112 S. Ct. at 1873), for such discrimination is "an invidious practice that causes grave harm to its victims" (*id.* at 1872). The Court noted, however, that the monetary remedy then available under Title VII was limited to back pay (*id.* at 1874 & n.12) and that the recovery obtained by the taxpayer in *Burke* thus focussed exclusively on "legal injuries of an economic character." *Id.* at 1873, quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975). Since Section 104(a)(2) provides an exclusion only for damages awarded "on account of personal injuries," and since the taxpayer in *Burke* had received no compensation for the "traditional harms associated with personal injury, such as pain and suffering, emotional distress, [and] harm to reputation" (*id.* at 1873), the Court held that Section 104(a)(2) was not applicable.

The Court thus concluded in *Burke* that Section 104(a)(2) applies only when the underlying cause of action that led to the taxpayer's recovery provides compensation for the "personal," as well as "economic," components of the taxpayer's injury. 112

nonphysical injuries to the individual, such as those affecting emotions, reputation, or character, as well [as physical injuries]." 112 S. Ct. at 1871 n.6.

S. Ct. at 1874. A cause of action that does not compensate for the traditional harms associated with personal injuries—"such as pain and suffering, emotional distress, [and] harm to reputation"—does not yield "damages * * * on account of personal injuries" within the exclusion from gross income provided by Section 104(a)(2).[4]

2. The Court drew support for its interpretation both from the language of the statute and from the administrative practice under it. The Internal Revenue Service has long interpreted Section 104(a)(2) to apply only to recoveries based upon "tort or tort type" claims that compensate for personal, as well as economic, injuries. See 26 C.F.R. 1.104-1(c); Rev. Rul. 72-341, 1972-2 C.B. 32 (back pay under pre-1991 version of Title VII not excluded from income); Rev. Rul. 72-268, 1972-1 C.B. 313 (overtime and minimum wages awarded under Fair Labor Standards Act not excluded from income).[5]

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[4] The availability of compensatory damages for intangible elements of personal injury such as pain and suffering and emotional distress is an essential characteristic of a personal injury tort action. See *Vicksburg & Meridian R.R.* v. *Putnam*, 118 U.S. 545, 554 (1886); 3 L. Frumer & M. Friedman, *Personal Injury* § 3.01, at 94 (1991); 2 S. Speiser, C. Krause & A. Gans, *The American Law of Torts* § 8:18, at 552 (1985). Awards for pain and suffering are estimated to account for 72% of damages in personal injury litigation. *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 462 U.S. 523, 552 n.35 (1983). See also D. Dobbs, *Remedies* 530 (1973) ("emotional distress is a strong element in the dignitary tort cases and accounts for a substantial portion of the damages award").

[5] In 1960, the Internal Revenue Service adopted regulations that "linked identification of a personal injury for purposes of § 104(a)(2) to traditional tort principles" (*United States* v. *Burke*, 112 S. Ct. at 1870) by providing (26 C.F.R. 1.104-1(c)):

> The term "damages received (whether by suit or agreement)" means an amount received * * * through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution.

The Court noted in *Burke* that a claim based upon "a 'dignitary' or nonphysical tort" permits recovery "not only [of] any actual pecuniary loss (*e.g.*, loss of business or customers), but for 'impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.'" 112 S. Ct. at 1871-1872, quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). See also D. Dobbs, *Remedies* 509 (1973) (with dignitary torts, "though economic or physical loss may be associated with the injury, the primary or usual concern is not economic at all, but vindication of an intangible right"). The Court concluded that a legal claim that provides no compensation for these intangible, personal elements of injury is not a "tort or tort type" claim within the meaning of the regulation (112 S. Ct. at 1873) and that any resulting award based on such a claim does not represent damages "on account of personal injuries" within the meaning of the statute (*id.* at 1873-1874).[6]

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[6] Justice Souter's concurring opinion reached the same conclusion by a different route. Justice Souter identified the dispositive question in *Burke* to be whether the underlying action "was one 'based upon tort or tort type rights.' 26 C.F.R. § 1.104-1(c) (1991)." 112 S. Ct. at 1877. He noted that the limitation of recovery to back pay under the pre-1991 version of Title VII reflected a "quintessentially * * * contractual measure of damages" (*ibid.*) and thus departed from the ordinary model of tort relief. Justice Souter con-

The interpretation of Section 104(a)(2) adopted by the Court in *Burke* is supported by the language of the statute and is consistent with the administrative practice. The Court's interpretation has the further virtue of providing an administrable rule. Following the decision in *Burke*, the Internal Revenue Service concluded that recoveries under statutory schemes (such as the post-1991 provisions of Title VII) that provide compensation for the "traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, [and] other consequential damages" (112 S. Ct. at 1873), are excluded from income by Section 104(a)(2). See Rev. Rul. 93-88, 1993-2 C.B. 61.[7]

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cluded that "the outcome in this case follows from the default rule of statutory interpretation that exclusions from income must be narrowly construed" (*id.* at 1878, citing *United States* v. *Centennial Savings Bank*, 499 U.S. at 583; *Commissioner* v. *Jacobson*, 336 U.S. 28, 49 (1949)). Since "an accession to wealth is not to be held excluded from income unless some provision of the Internal Revenue Code clearly so entails," and since in *Burke* there was "no clear application of 26 U.S.C. § 104(a)(2), as interpreted by the Treasury Regulation," Justice Souter concluded that the back pay received by the taxpayer in that case was not excluded from income. 112 S. Ct. at 1878.

[7] As the Court observed in *United States* v. *Burke*, 112 S. Ct. at 1874 n.12, the post-1991 provisions of Title VII provide for a broad range of compensatory damages for intangible elements of injury in disparate treatment cases. Following *Burke*, the Service concluded that recoveries in post-1991 Title VII disparate treatment cases—as well as compensatory damages received under 42 U.S.C. 1981 (Supp. IV 1992) and under the Americans with Disabilities Act—are excluded from gross income under Section 104(a)(2). Rev. Rul. 93-88, 1993-2 C.B. 61, 63. The 1991 amendments to Title VII did not, however, alter the remedies available in

By contrast, statutory remedies that do not compensate for the "traditional harms associated with personal injury" are not excluded from income under the statute. *Id.* at 62-63.

B. Back Pay And Liquidated Damages Awarded Under The ADEA Do Not Represent Damages Received On Account Of Personal Injuries

The remedies for an unlawful discharge under the ADEA include reinstatement, back pay, injunctive and declaratory relief and attorneys fees. See 29 U.S.C. 626(b); 29 U.S.C. 216(b), 217. The ADEA also authorizes an additional award of "liquidated damages" in an amount equal to the backpay award "in cases of willful violations" of that Act. 29 U.S.C. 626(b). The back pay and liquidated damages received by respondent under the ADEA do not compensate for the "traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, [and] consequential damages" (*United States* v. *Burke*, 112 S. Ct. at 1873). ADEA back pay and liquidated damages compensate for economic losses but provide no compensation for the personal component of the victim's injuries. They therefore do not represent damages received "on account of personal injuries" and are not excluded from income under Section 104(a)(2).

1. Applying this Court's decision in *Burke*, the Seventh Circuit properly concluded in *Downey* v. *Commissioner*, 33 F.3d at 839, that back pay and

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disparate impact cases from those available in *Burke*. The Service accordingly ruled in Revenue Ruling 93-88 that back pay received in disparate impact cases is not excluded from gross income. 1993-2 C.B. at 63.

liquidated damages received under the ADEA are not excludable from gross income under Section 104 (a)(2). The remedial scheme of the ADEA, like the remedial scheme of pre-1991 Title VII, focusses on the economic loss, rather than the personal injury, of the employee. See *Castle* v. *Sangamo Weston, Inc.*, 837 F.2d 1550, 1561 (11th Cir. 1988); *Kolb* v. *Goldring, Inc.*, 694 F.2d 869, 872 (1st Cir. 1982).[8] The ADEA authorizes back pay, reinstatement (as equitable relief), front pay in lieu of reinstatement, and liquidated damages for willful violations. See *Hansard* v. *Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1469 & n.3 (5th Cir.), cert. denied, 493 U.S. 842 (1989).[9] The ADEA does not, however, provide compensation for "traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other consequential damages" (*United States* v. *Burke*, 112 S. Ct. at 1873). See, *e.g.*, *Haskell* v. *Kaman Corp.*, 743 F.2d 113, 120-121 & n.2 (2d Cir. 1984); *Kolb* v. *Goldring, Inc.*, 694 F.2d at 872. Indeed, evidence of these intangible elements of personal injury is not admissible in

[8] The remedial provisions of the ADEA were modeled on, but are not identical to, the remedial provisions of the Fair Labor Standards Act. *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 125 (1985). See also *Lorillard* v. *Pons*, 434 U.S. 575 (1978); page 22, *infra*.

Under the ADEA, "[p]ain and suffering form no part of the damages." *Kolb* v. *Goldring, Inc.*, 694 F.2d at 872. "Unlike the tort plaintiff, the plaintiff suing under the ADEA may recover only 'those pecuniary benefits connected to the job relation'" and "[f]rom these must be subtracted post-termination economic benefits." *Ibid.*

[9] Front pay was also available under the pre-1991 version of Title VII that was involved in *United States* v. *Burke*. See 112 S. Ct. at 1873 n.9.

ADEA litigation. *Guthrie* v. *J.C. Penney Co.*, 803 F.2d 202, 208 (5th Cir. 1986); *Haskell* v. *Kaman Corp.*, 743 F.2d at 121; *Hill* v. *Spiegel, Inc.*, 708 F.2d 233, 236 (6th Cir. 1983); *Pfeiffer* v. *Essex Wire Corp.*, 682 F.2d 684, 688 (7th Cir.), cert. denied, 459 U.S. 1039 (1982).

The only difference between the remedial scheme provided by the pre-1991 version of Title VII involved in *Burke* and the remedial scheme provided by the ADEA is that victims of age discrimination may recover "liquidated damages" equal to the backpay award under the ADEA when—but only when—the employer has engaged in "willful" violations of the statute (29 U.S.C. 626(b)).[10] Liquidated damages do not compensate for intangible, personal injuries of the employee. Instead, liquidated damages may be awarded *only* in cases where the employee has suffered economic loss from an employer's willful age discrimination. The amount of liquidated damages awarded for "willful violations" of the ADEA (29 U.S.C. 626(b)) is set, by statute, at an amount "equal" to the backpay award (29 U.S.C. 216(b)). When an employee obtains only declaratory or equitable relief and does not recover back pay, or when the employer's violation was not willful, liquidated damages may not be awarded under the ADEA even though the employee suffers a "per-

[10] Federal employees may not recover liquidated damages under the ADEA. 29 U.S.C. 633a; *Smith* v. *OPM*, 778 F.2d 258, 263 (5th Cir. 1985), cert. denied, 476 U.S. 1105 (1986). The remedies provided to a federal employee under the ADEA are thus identical to the remedies provided by the pre-1991 version of Title VII. Back pay received by federal employees for age discrimination is therefore not excludable from gross income under the precise holding of *United States* v. *Burke*.

sonal" (as well as "economic") injury from the discrimination (*United States* v. *Burke*, 112 S. Ct. at 1873). See *Kossman* v. *Calumet County*, 849 F.2d 1027, 1029-1030 (7th Cir. 1988); *Fariss* v. *Lynchburg Foundry*, 769 F.2d 958, 967 (4th Cir. 1985). Moreover, when an award of liquidated damages *is* available under the ADEA, its amount has no relationship to the "personal injuries" endured by the victim of discrimination. As this Court concluded in *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 125-126 (1985), ADEA liquidated damages, which are available only for "willful violations" of the Act, are not compensatory; they are "punitive in nature" and function as an enforcement mechanism to deter intentionally unlawful conduct.

2. The Tax Court thus erred in this case in concluding that liquidated damages under the ADEA are compensatory and represent "only a substitute for difficult to measure personal injuries resulting from discriminatory employment" (Pet. App. 21a). In reaching that conclusion, the Tax Court attempted to distinguish (*id.* at 27a) this Court's conclusion in *Trans World Airlines* that ADEA liquidated damages are "punitive in nature" (469 U.S. at 125). The Tax Court reasoned that "the ADEA was modeled in part" on the Fair Labor Standards Act of 1938 (Pet. App. 28a) and that, under the FLSA, this Court held in *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 707 (1945), and *Overnight Motor Transportation Co.* v. *Missel*, 316 U.S. 572, 583-584 (1942), that FLSA liquidated damages represented compensation for "damages too obscure and difficult of proof" (Pet. App. 29a). In *Schmitz* v. *Commissioner*, the Ninth Circuit adopted and applied the

same reasoning as the Tax Court, relying on *Brooklyn Savings Bank* and *Overnight Motor Transportation* to conclude that ADEA liquidated damages are not "solely punitive in nature" but are awarded "to compensate victims for damages which are too obscure and difficult to prove" (34 F.3d at 794).[11]

The Tax Court and the Ninth Circuit fundamentally erred in relying on *Brooklyn Savings Bank* and *Overnight Motor Transportation.* Prior to 1947, liquidated damages were awarded automatically under the FLSA as additional compensation to every employee whose employer failed to pay the minimum

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[11] The Ninth Circuit advanced one other reason in support of its conclusion that ADEA recoveries are excluded from tax under Section 104(a)(2). The court noted that, unlike the pre-1991 version of Title VII, jury trials are available under the ADEA. The court of appeals suggested that this fact "distinguishes ADEA from the statute discussed in *Burke*" (34 F.3d at 793). It is true that ADEA litigants are entitled to jury trials (*Lorillard* v. *Pons*, 434 U.S. 575 (1978)) and that, in *Burke*, this Court noted that jury trials were not available under the pre-1991 version of Title VII. See 112 S. Ct. at 1872. But, while the lack of a right to a jury trial may indicate that the remedy is *not* "tort type" in nature (see *id.* at 1873), the availability of a jury trial does not indicate that the right *is* "tort type." At common law, jury trials were available for contract, as well as tort, claims. Moreover, "liquidated damages" are not a traditional tort remedy; instead, they are an ordinary remedy for breach of contract. See *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 151 (1956); *Restatement (Second) of the Law of Contracts* § 356 (1981).

In *Burke*, the Court held that the dispositive question under Section 104(a)(2) is whether the legal right compensates for the personal, as well as economic, components of the taxpayer's injury. The parties' constitutional or statutory entitlement to a jury trial has only a remote relationship to that inquiry.

wage. *Overnight Motor Transportation Co.* v. *Missel*, 316 U.S. at 581-584. Under the pre-1947 provisions of the FLSA, liquidated damages in an amount equal to unpaid minimum wages were awarded without any showing that the employer had "willfully," or in bad faith, violated that Act. *Ibid.* It was in that statutory context that this Court stated—in 1945 in *Brooklyn Savings Bank* and in 1942 in *Overnight Motor Transportation*—that FLSA liquidated damages were "not penal in nature but constitute[d] compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages." 324 U.S. at 707. See 316 U.S. at 583-584.

The FLSA was amended in 1947, however, to limit the availability of liquidated damages under that Act in situations where the employer had acted "in good faith" and with "reasonable grounds for believing that his act or omission was not a violation" of the Act. 29 U.S.C. 260. See Act of May 14, 1947, ch. 52, § 11, 61 Stat. 89.[12] When the ADEA was enacted

[12] As the Court explained in *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. at 128 n.22:

> The Court interpreted the FLSA, as originally enacted, as allowing the recovery of liquidated damages any time that there was a violation of the Act. See *Overnight Motor Transportation Co.* v. *Missel*, 316 U.S. 572 (1942). In response to its dissatisfaction with that harsh interpretation of the provision, Congress enacted the Portal-to-Portal Act of 1947. See *Lorillard* v. *Pons*, 434 U.S. 575, 581-582, n.8 (1978). Section 11 of the PPA, 29 U.S.C. § 260, provides the employer with a defense to a mandatory award of liquidated damages when it can show good faith and reasonable grounds for believing it was not in violation of the FLSA.

in 1967, and "modeled in part" on the then-existing provisions of the FLSA (Pet. App. 28a), the availability of liquidated damages was further expressly limited to those situations where the employer had "willfully" violated the ADEA. 29 U.S.C. 626(b). It was in this context that this Court correctly concluded in 1985 in *Trans World Airlines, Inc.* v. *Thurston* that ADEA liquidated damages are "punitive in nature" (469 U.S. at 125) and are designed to "furnish an effective deterrent to willful violations" of that Act. *Ibid.*, quoting 113 Cong. Rec. 7076 (1967) (Sen. Javits). Although *mandatory* liquidated damages available to every injured party serve a compensatory function, liquidated damages available only for "willful violations" of the Act are solely "punitive in nature." They "are not intended to compensate the injured party, but rather to punish the [party] whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct" (*City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 266 (1981)).[13]

Indeed, in *Trans World Airlines*, this Court specifically discussed and distinguished its decisions under the different statutory text involved in *Brooklyn Savings Bank* and *Overnight Motor Transportation*. The Court noted that the "good faith" defense to liquidated damages under the 1947 amendment to the FLSA was adopted by Congress in "dissatisfaction" with the Court's earlier conclusion that such damages

[13] This Court stated in *International Brotherhood of Electric Workers* v. *Foust*, 442 U.S. 42, 48 (1979) (internal quotation marks omitted), that "[p]unitive damages are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."

were automatically available as additional compensation under the FLSA. 469 U.S. at 128 n.22. See note 12, *supra*. After *Brooklyn Savings Bank* and *Overnight Motor Transportation* were decided, Congress concluded that liquidated damages under the ADEA are to be available solely as a punitive measure to deter "willful violations" of that Act, rather than as a form of legal compensation to employees who may incur intangible damages that are too obscure and difficult of proof. See 469 U.S. at 125, 128 n.21. The Tax Court therefore erred (i) in relying on *Brooklyn Savings Bank* and *Overnight Motor Transportation*—which described the compensatory nature of *mandatory* liquidated damages provisions—and (ii) in failing to recognize that those very decisions were distinguished by this Court in *Trans World Airlines, Inc.* v. *Thurston*, when the Court held that liquidated damages for "willful violations" of the ADEA are not compensatory but "punitive in nature." 469 U.S. at 125, 128 n.22.[14]

Because neither back pay nor liquidated damages under the ADEA compensates the victim of age discrimination for the traditional personal harms associated "with personal injury, such as pain and suffer-

[14] The Tax Court similarly erred in relying (Pet. App. 29a) on a statement contained in unrelated legislative history involving 1978 amendments to the ADEA that, also evidently relying on the inapposite decisions of *Brooklyn Savings Bank* and *Overnight Motor Transportation*, contained the same misdescription of the nature of liquidated damages under the ADEA. This Court's 1985 decision in *Trans World Airlines, Inc.* v. *Thurston*, which plainly held (and clearly explained) that ADEA liquidated damages are an enforcement mechanism that is punitive in nature, should have laid to rest the anachronistic error of relying on *Brooklyn Savings Bank* and *Overnight Motor Transportation* for any contrary conclusion.

ing, emotional distress, harm to reputation, [and] other consequential damages" (*United States* v. *Burke*, 112 S. Ct. at 1873), the recovery of such payments does not represent damages received "on account of personal injuries" and is not excluded from income under Section 104(a)(2).[15]

C. Liquidated Damages Under The ADEA Are Not Excluded From Income Under Section 104(a)(2) For The Additional Reason That They Are Awarded "On Account Of" The Defendant's Willful Misconduct Rather Than "On Account Of" The Taxpayer's Personal Injury

The conclusion that ADEA back pay and liquidated damages are not excluded from income by Section 104(a)(2) follows directly from this Court's decisions in *United States* v. *Burke* and *Trans World Airlines, Inc.* v. *Thurston*. There is, moreover, an additional and independent reason why respondent's

[15] The Ninth Circuit speculated that "ADEA liquidated damages might compensate some plaintiffs for the emotional distress and future psychic injuries they may suffer upon return to work, for lost future wages which they cannot mitigate, for lost reputation, for their families' emotional distress and suffering, for the psychic toll of suing one's employer or any number of other injuries" (*Schmitz* v. *Commissioner*, 34 F.3d at 796 n.8). That speculation is entirely without support. Evidence of these types of personal injuries is inadmissible in an ADEA trial. See pages 18-19, *supra*. Moreover, the amount of the liquidated damages award, when available, is calculated wholly without consideration of the extent of such injuries. See page 20, *supra*. As this Court held in *United States* v. *Burke*, although such personal injuries may be presumed to exist, in varying degrees, in any employment discrimination case (112 S. Ct. at 1873), a statutory remedy that does not in fact compensate those injuries does not yield damages "on account of personal injuries" under Section 104(a)(2).

recovery of liquidated damages under the ADEA is not excluded from income under Section 104(a)(2).[16]

When applicable, Section 104(a)(2) permits exclusion only of damages received "on account of" personal injuries. As the Fourth Circuit concluded in *Commissioner* v. *Miller*, 914 F.2d 586 (1990), damages awarded as punishment of a wrongdoer, rather than as compensation for an injury, are awarded "on account of" malice or willfullness, not "on account of" personal injury. *Id.* at 589-592.[17] Accord *Hawkins* v. *United States*, 30 F.3d 1077, 1080-1084 (9th Cir. 1994), petition for cert. pending, No. 94-1041 (filed Dec. 9, 1994); *Reese* v. *United States*, 24 F.3d 228,

[16] This additional rationale need not be addressed by the Court if it concludes, under the reasoning of the Court's decision in *Burke*, that back pay and liquidated damages are not excluded from income under Section 104(a)(2).

[17] In *Commissioner* v. *Miller*, the court of appeals stated that recoveries of liquidated damages under the Equal Pay Act were distinguishable from punitive damages on the theory that the statutory liquidated damages served "both a deterrent *and* compensatory purpose." 914 F.2d at 591. The court based that description of statutory liquidated damages solely on its decision in *Thompson* v. *Commissioner*, 866 F.2d 709, 711 (4th Cir. 1989). See 914 F.2d at 591. In turn, in *Thompson*, the court relied directly on this Court's decision in *Brooklyn Savings Bank* for the conclusion that liquidated damages under the Equal Pay Act represent "compensation" of the employee rather than punishment of the employer. 866 F.2d at 712. That reliance on *Brooklyn Savings Bank* was in error for the reasons explained on pages 20-24, *supra*. Liquidated damages under the Equal Pay Act, like the FLSA (after 1947), are not compensatory; they are available as a deterrence to those employers who do not act in "good faith." 29 U.S.C. 260. See *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. at 128 n.22.

230-235 (Fed. Cir. 1994). Punitive damages and statutory penalties for "willful" violations of the law thus do not come within the literal terms of the exclusion from income provided by Section 104(a)(2).[18]

1. As the court of appeals explained in *Reese* v. *United States*, 24 F.3d at 230, "[t]he language 'on account of' is not free of ambiguity; rather, it is susceptible of at least two conflicting interpretations."

> Under a but-for causation approach, the fact that a plaintiff has to sustain a personal injury as a prerequisite to an award of punitive damages leads to the conclusion that the punitive

[18] The only conflicting appellate authority is *Horton* v. *Commissioner*, 33 F.3d 625, 631-632 (6th Cir. 1994). In that case, the Sixth Circuit stated that it disagreed with the conclusion in *Commissioner* v. *Miller*, *supra*, and *Hawkins* v. *United States*, *supra*, that punitive damages were not excluded from income under Section 104(a)(2). The court reasoned, however, that, under Kentucky law, the taxpayer's award of punitive damages "served a compensatory function," as well as a punitive purpose, and stated that the *Miller* and *Hawkins* decisions were "distinguishable" on that basis. 33 F.3d at 631-632.

The Ninth Circuit once held that punitive damages were excluded from income under the statute, but did so in reliance on a 1975 Revenue Ruling that had abandoned the Treasury's prior, longstanding position that punitive damages were not excluded from income under Section 104(a)(2). See *Commissioner* v. *Miller*, 914 F.2d at 591, citing *Roemer* v. *Commissioner*, 716 F.2d 693, 700 (9th Cir. 1983). After the Treasury returned to its original view, and ruled again in 1984 that punitive damages are not excluded from income, the Ninth Circuit rejected its decision in *Roemer* and interpreted the statute not to exclude punitive damages from income. *Hawkins* v. *United States*, 30 F.3d at 1082. See Rev. Rul. 85-98, 1985-2 C.B. 51; Rev. Rul. 84-108, 1984-2 C.B. 32; Rev. Rul. 75-45, 1975-1 C.B. 47.

damages were "on account of" the plaintiff's injury, even though a punitive damage award requires the additional showing of, and is responsive only to, egregious conduct by the defendant. However, under a sufficient causation approach, the fact that personal injury is a prerequisite to punitive damages does *not* lead to the conclusion that the punitive damages were "on account of" the plaintiff's injuries because, even if the other elements of the tort are present, personal injury alone does not sustain a punitive damage award. The fact that a plaintiff seeking punitive damages has to show egregious conduct by the defendant indicates that the plaintiff's injury was not a sufficient cause of the punitive damages. Thus, the mere fact that "on account of" suggests "causation" does not answer the question of whether "on account of" suggests but-for causation or sufficient causation.

Commissioner v. *Miller*, 914 F.2d at 589-590 (footnote omitted). Accord *Reese* v. *United States*, 24 F.3d at 230-231.

Based upon the "well-recognized, even venerable, principle that exclusions to income are to be construed narrowly," these courts correctly resolved the textual ambiguity in favor of a narrow construction of the statutory exclusion from income. *Commissioner* v. *Miller*, 914 F.2d at 590, citing *Commissioner* v. *Jacobson*, 336 U.S. 28, 49 (1949). See also *Hawkins* v. *United States*, 30 F.3d at 1084, citing *United States* v. *Centennial Savings Bank*, 499 U.S. at 583-584. They therefore concluded that punitive damage awards are not excluded from income under Section 104(a)(2) because those awards are obtained "on account of" the defendant's malice or willfulness rather than "on account of" the personal injuries of the taxpayer.

2. This interpretation of the text of the statute comports with its structure, its legislative history and its evident purpose. As the title of the statute reflects, Section 104(a)(2) provides an exclusion from income for "[c]ompensation for injuries or sickness," not for sanctions awarded to deter malicious or willful misconduct.[19] The Federal Circuit correctly observed in *Reese* v. *United States*, 24 F.3d at 231, that the focus of the statute in general, and of each of its subsections in particular,[20] is on amounts that compensate for injury or sickness, not on payments exacted to punish misconduct. Accord *Hawkins* v. *United States*, 30 F.3d at 1083. Cf. *United States* v. *Burke*, 112 S. Ct. at 1876 (Scalia, J., concurring).

"There is also evidence in the legislative history of section 104(a)(2) supporting the conclusion that

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[19] In *INS* v. *National Center for Immigrants' Rights, Inc.*, 112 S. Ct. 551 (1991), the Court noted that "the title of a statute or section can aid in resolving an ambiguity in the legislation's text." *Id.* at 556, citing, *e.g.*, *Mead Corp.* v. *Tilley*, 490 U.S. 714, 723 (1989).

[20] Section 104(a)(1) excludes from gross income "amounts received under workmen's compensation acts as compensation for personal injuries or sickness." Section 104(a)(3) excludes certain "amounts received through accident or health insurance for personal injuries or sickness * * *." Section 104(a)(4) excludes "amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country or in the Coast and Geodetic Survey or the Public Health Service * * *." Section 104(a)(5) excludes "amounts received by an individual as disability income attributable to injuries incurred as a direct result of a * * * terrorist attack * * * while such individual was an employee of the United States engaged in the performance of his official duties outside the United States." See 26 U.S.C. 104(a)(1)-(5).

punitive damages are not excludable from gross income." *Reese* v. *United States*, 24 F.3d at 232. Just prior to the enactment of the original version of Section 104(a)(2) as Section 213(b)(6) of the Revenue Act of 1918 (see note 3, *supra*),

> the Secretary of the Treasury requested an opinion from the Attorney General concerning the tax treatment of accident insurance proceeds received on account of personal injuries. *See* 31 Op.Atty.Gen. 304 (1918). In response, the Attorney General concluded that "the proceeds of an accident insurance policy [were] not 'gains or profits and income' " but were instead a return of capital and hence were not taxable in accordance with statute and precedent. *Id.* at 308; *accord Doyle v. Mitchell Bros. Co.*, 247 U.S. 179, 185 (1918).
>
> After the Attorney General's report, the IRS issued a decision holding that "the proceeds of an accident insurance policy received by an individual on account of personal injuries . . . [were] not taxable . . . ." T.D. 2747, 20 Treas. Dec.Int.Rev. 457 (1918). Moreover, the IRS held "upon similar principles that an amount received by an individual as the result of a suit or compromise for personal injuries" would not be taxable. *Id.*
>
> Subsequent to these events, section 213(b)(6) was enacted. In a 1918 report of the House Committee on Ways and Means, Congress explained the rationale behind section 213(b)(6) as follows:
>
> > Under the present law it is doubtful whether amounts received through accident or health insurance, or under workmen's compensation acts, as compensation for personal injury or sickness, and damages received on account of such injuries or sickness, are required to be included in gross income. The proposed bill provides that such amounts shall not be included in gross income.

H.R.Rep. No. 767, 65th Cong., 2d Sess. 9-10 (1918). With the passage of section 213(b)(6), Congress likely intended to codify the IRS's stated approach, which was in turn based on the Attorney General's opinion. After the enactment of section 213(b)(6), the IRS noted that "so far as personal injuries are concerned, [section 213(b)(6)] is merely declarative of the [Attorney General's and IRS's] conclusions and intended to go no further." 2 C.B. 71, 72 (1920) (citing 31 Op.Atty.Gen. 304 and T.D. 2747). The IRS continued: "These conclusions rest, as stated, upon the theory of conversion of capital assets. It would follow that personal injury not resulting in the destruction or diminution in the value of a capital asset would not be within the exemption." *Id.* at 72.

> In view of the focus on the "conversion of capital assets" theory in the passage of section 104(a)(2)'s predecessor, it would be inconsistent with the legislative history to treat punitive damages as excludable from income, since punitive damages in no way resemble a *return* of capital.

Reese v. *United States*, 24 F.3d at 233 (parallel citations omitted).

This Court reviewed much of this same legislative and administrative history in *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955). In that case, the Court concluded that punitive damages for fraud and statutory treble damages under the antitrust

laws are income subject to tax. In so holding, the Court stated (*id.* at 432 n.8) (emphasis added):

> The long history of departmental rulings holding personal injury recoveries nontaxable on the theory that they roughly correspond to a return of capital cannot support exemption of punitive damages[.] * * * *Damages for personal injury are by definition compensatory only.*

As this Court thus indicated in *Glenshaw Glass*, the limitation of Section 104(a)(2) to damages that compensate for the injury—and its inapplicability to awards that punish and deter others—comports with the history and purpose of the statute, as well as with its text and structure. See *Hawkins* v. *United States*, 30 F.3d at 1080-1084; *Commissioner* v. *Miller*, 914 F.2d at 590. See also 1 B. Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 13.1.4 (1981) ("The rationale for [Section 104(a)(2)] * * * is presumably that the recovery does not generate a gain or profit but only makes the taxpayer whole by compensation for a loss.").[21]

3. In 1989, Section 104(a) was amended to provide that Section 104(a)(2)'s exclusion "shall not apply to any punitive damages [received] in connection with a case not involving physical injury or physical sickness." 26 U.S.C. 104(a) (Supp. V 1993). See Revenue Reconciliation Act of 1989, Pub. L. No. 101-239, Tit. VII, § 7641(a), 103 Stat. 2379. In

[21] In *Starrels* v. *Commissioner*, 304 F.2d 574, 576 (9th Cir. 1962), the court explained that the history and administration of this statute reveal that "[d]amages paid for personal injuries are excluded from gross income because they make the taxpayer whole from a previous loss of personal rights—because, in effect, they restore a loss to capital."

Burke, this Court suggested that this amendment "allow[s]" the exclusion of punitive damages in physical injury cases after 1989. 112 S. Ct. at 1871 n.6. That question, however, was not presented in *Burke* and had not been addressed by the parties in that case. The Court's statements on that issue in *Burke* were therefore dicta.[22] The proper interpretation of

[22] As Professor Kahn has recently demonstrated, the suggestion that the 1989 amendment allows the exclusion of punitive damages in physical injury cases after 1989 is at odds with the history and context of the amendment. Kahn, *Taxation of Punitive Damages Obtained in a Personal Injury Claim*, 65 Tax Notes 487 (1994). The 1989 amendment originated in a House bill that would have confined the statutory exclusion to damages received in cases involving physical injury or physical sickness. H.R. 3299, 101st Cong., 1st Sess. § 11641 (1989). The House report states that this bill was a reaction to then-recent decisions (prior to *Burke*) that had held damages recovered in nonphysical injury cases involving employment discrimination and injury to reputation to be excluded from gross income. H.R. Rep. No. 247, 101st Cong., 1st Sess. 1354-1355 (1989). The House bill was modified in conference to provide only that the Section 104(a)(2) exclusion "shall not apply to any punitive damages [received] in connection with a case not involving physical injury or physical sickness." Revenue Reconciliation Act of 1989, Pub. L. No. 101-239, Tit. VII, § 7641(a), 103 Stat. 2379. Professor Kahn notes that the Conference Committee redacted language from another version of the bill that had affirmatively provided for the exclusion of punitive damages received in physical injury cases and substituted the "double negative" phraseology contained in the 1989 amendment. 65 Tax Notes at 489-490. The amendment thus enacted by Congress precludes application of the Section 104(a)(2) exclusion to punitive damages received in nonphysical injury cases but is silent as to the taxation of punitive damages received in physical injury cases. Any interpretation of this amendment to allow the exclusion of punitive damages in physical injury cases after 1989 would

the 1989 amendment is also not at issue in the present case, which does not involve a physical injury and instead involves an unlawful discharge and an associated tax return which preceded the effective date of the 1989 amendment.

The 1989 amendment also does not indicate that punitive damages and statutory penalties were excluded from gross income under the pre-1989 version of the statute. Neither the text of the amendment nor its history supports any suggestion that Congress (either in 1989 or in 1919) believed punitive damages were properly excluded from tax under the original statute.[23] See note 22, *supra*.

> At the time of the proposed amendment, several cases had recently held that § 104(a)(2) excludes damages recovered in cases involving employment discrimination and injury to reputation * * * and some had even held that punitive damages awarded in such cases are excludable. * * * That Congress elected to overrule such cases does not prove that, prior to Congress's action, the statute meant the opposite.

Hawkins v. *United States*, 30 F.3d at 1082. See also *Higgins* v. *Smith*, 308 U.S. 473, 479-480 (1940) (rejecting claim that enactment of an amendment explicitly forbidding a deduction for losses establishes that the law was formerly otherwise).

4. Liquidated damages for "willful violations" of the ADEA, like punitive damages generally, are "not intended to compensate the injured party, but rather to punish the [party] whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct" (*City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. at 266-267). See *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. at 125. Such damages are awarded on account of the employer's willful misconduct, not as compensation for injury. They are therefore not excluded from income under Section 104(a)(2).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

KENT L. JONES
Assistant to the Solicitor General

ANN B. DURNEY
EDWARD T. PERELMUTER
Attorneys

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thus be contrary to the fundamental principle of statutory construction that "[e]xemptions from taxation do not rest upon implication." *United States Trust Co.* v. *Helvering*, 307 U.S. 57, 60 (1939).

[23] As this Court has frequently emphasized, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U.S. 304, 313 (1960). The interpretive value of an amendment to a statute is particularly dubious when, as here, the amendment was enacted long after the original provision. *Rainwater* v. *United States*, 356 U.S. 590, 593 (1958).

(5)

No. 94-500

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ERICH E. and HELEN B. SCHLEIER,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS

THOMAS F. JOYCE
Counsel of Record
ALAN M. SERWER
BELL, BOYD & LLOYD
70 West Madison Street
Suite 3200
Chicago, Illinois 60602
(312) 372-1121

RAYMOND C. FAY
BELL, BOYD & LLOYD
1615 L Street, N.W.
Washington, D.C. 20036
(202) 466-6300

Attorneys for Respondents

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

56P

QUESTION PRESENTED

Whether age discrimination in violation of the duty imposed by the Age Discrimination in Employment Act of 1967 is a tort-like personal injury, entitling victims to exclude settlement amounts from their gross income as "damages received . . . on account of personal injuries" under Section 104(a)(2) of the Internal Revenue Code.

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Erich Schleier was fired by United Air Lines, Inc. ("United") when he became 60 years old. Mr. Schleier and others sued United for age discrimination, seeking lost earnings, liquidated damages, injunctive relief, and other relief. (Nos. 79C 360 and 79C 1572, N.D. Ill., Tax Ct. Pet. Ex. B.) A jury found that the airline had engaged in willful misconduct in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (the "ADEA"), but the decision was reversed and remanded by the Seventh

Circuit Court of Appeals. *See Monroe* v. *United Air Lines, Inc.*, 736 F.2d 394 (7th Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985). Before a second trial, the parties settled. (Tax Ct. Pet. at 2-4.)

The settlement released United from all claims that each plaintiff "ever had or now has under the Age Discrimination in Employment Act, state age discrimination laws, or the common law of any state regarding wrongful or unlawful discharge. . . ." Mr. Schleier received settlement payments allocated equally between "back pay" and "liquidated damages." The amount denominated "back pay" represented damages measured by the lost earnings Mr. Schleier would have received had there been no discrimination. It did not represent additional compensation for any services he performed in United's employ. (Tax Ct. Pet. Ex. C.)

The settlement agreement stipulated that the amounts allocated to ADEA liquidated damages were not subject to payroll or income tax withholding. United wrote separate checks for Mr. Schleier's lost earnings and liquidated damages, calling the latter amount "liquidated damages." United did not withhold any payroll or income taxes from the amount of the settlement allocated to Mr. Schleier's ADEA liquidated damages. (Tax Ct. Pet. Ex. D).

When he filed his 1986 federal income tax return, Mr. Schleier paid tax on his ADEA lost earnings damages but excluded the ADEA liquidated damages from his gross income. Petitioner issued a statutory notice of deficiency on September 17, 1990, proposing to tax Mr. Schleier's ADEA liquidated damages. (Tax Ct. Pet. Ex. A.) In his petition to the Tax Court, Mr. Schleier alleged error with respect to the taxation of his ADEA liquidated damages and asked for a refund of tax on the part of his ADEA settlement allocable to his lost earnings. (Tax Ct. Pet. at 2.)

The Tax Court held that all of Mr. Schleier's ADEA settlement was excludable from his income under Section 104(a)(2) of the Internal Revenue Code.[1] The Fifth Circuit Court of Appeals affirmed, declining petitioner's suggestion for a hearing *en banc*.

SUMMARY OF ARGUMENT

1. Section 104(a)(2) excludes from gross income "*any* damages received . . . on account of personal injuries." (Emphasis added.) The regulations interpret this rule to include amounts received in settlement of a lawsuit involving "tort or tort type rights." Treas. Reg. § 1.104-1(c). Harmonizing the statutory requirement of a personal injury and the regulation's element of tort or tort-type rights, *United States* v. *Burke*, 112 S.Ct. 1867 (1992), emphasized that excludable personal injury damages are associated with remedial schemes offering jury trials and damages beyond lost wages. These elements, whose absence determined the taxation of damages under pre-1991 Title VII in *Burke*, are both present in the ADEA. 29 U.S.C. §§ 626(b), 626(c). ADEA liquidated damages compensate for difficult to measure injuries consequent to the act of discrimination, thereby offering a range of damages as required by *Burke*. Moreover, the punitive aspect of ADEA liquidated damages conceded by petitioner satisfies one of the indicia of tort-type rights identified by this Court in *Burke*.

The policy of Section 104(a)(2), extending legislative compassion to victims of tort-type injuries, is consistent with

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[1] References to the "Code" are to the Internal Revenue Code of 1954, as amended and in effect for the taxable year 1986. The amendment of Section 104(a) made in 1989 was prospective. *See* Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106, § 7641.

excluding ADEA damages from a victim's income and realizes the humanitarian objectives of the ADEA.

2. Petitioner's theory that liquidated damages are exclusively punitive under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (the "FLSA"), and the ADEA misreads *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985), contravenes the views of circuit courts of appeals, and cannot be reconciled with legislative history. The case relied on by petitioner to exemplify the proper tax treatment of ADEA damages, *Downey* v. *Commissioner*, 97 T.C. 150 (1991), *supp. op.*, 100 T.C. 634 (1993), *rev'd*, 33 F.3d 836 (7th Cir. 1994), *petition for cert. pending*, No. 94-999, reached its holding by failing to follow the decisions of this Court.

Furthermore, as shown by the internal contradictions in petitioner's brief, the conflicts between petitioner's statements to this Court and her arguments below, and the diametric opposition of her FLSA theory to the official agency view promulgated in Rev. Rul. 69-581, 1969-2 C.B. 25, petitioner has sacrificed doctrinal consistency in pursuit of a reversal. However, result-oriented litigation will exacerbate uncertainty among taxpayers and promote the uneven application of revenue laws. An arbitrary checkerboard of taxable and tax-exempt remedies under antidiscrimination statutes and other tort-type laws will discourage victims of discrimination from effectively exercising their rights.

3. Petitioner's alternative argument, that the ADEA liquidated damages portion of Mr. Schleier's settlement was not "on account of" any personal injury because of the allegedly exclusively punitive character of ADEA liquidated damages, conflicts with the legislative history and court decisions that consider ADEA liquidated damages at least partially compensatory. Although the tax treatment of purely punitive tort damages is not before the Court in Mr. Schleier's

case, the plain language and the policy of the statute support the inference from the 1989 tax amendment that pre-1989 punitive damages in personal injury cases are excludable from income, consistent with this Court's dictum in *Burke*, 112 S.Ct. at 1871 n. 6. The rationale relied on by some courts that have held to the contrary is conceptually unsound and irreconcilable with mainstream decisions under Section 104(a)(2).

ARGUMENT

I.

MR. SCHLEIER'S AGE DISCRIMINATION DAMAGES ARE EXCLUDABLE FROM HIS GROSS INCOME BECAUSE THEY WERE RECEIVED ON ACCOUNT OF PERSONAL INJURY IN A SUIT INVOLVING TORT OR TORT-TYPE RIGHTS.

A. Introduction.

The concept of gross income is broadly construed in order to fulfill the legislative policy of taxing all accessions to wealth, regardless of the source from which they are derived. *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 429 (1955). Exclusions from gross income should be recognized only where specifically mandated by Congress. *Id.* at 430.[2]

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[2] Despite the admonition of *Glenshaw Glass Co.* that exclusions from income require congressional action, the Internal Revenue Service has unilaterally excluded from income many categories of meliorative payments even in the absence of express legislative authorization. *See, e.g.*, Rev. Rul. 76-144, 1976-1 C.B. 17; Rev. Rul. 74-153, 1974-1 C.B. 20; Rev. Rul. 74-74, 1974-1 C.B. 18; Rev. Rul. 70-280, 1970-2 C.B. 13; Rev. Rul. 69-212, 1969-2 C.B. 34; Rev. Rul. 63-136, 1963-2 C.B. 19; Rev. Rul. 58-370, 1958-2 C.B. 14; Rev. Rul. 57-102, 1957-1 C.B. 26; Rev. Rul. 56-518, 1956-2 C.B. 25; Rev. Rul. 55-652, 1955-2 C.B. 21; and Rev. Rul. 55-132,

(continued...)

The tax code has recognized numerous exclusions from gross income.[3] The exclusion for damages received on account of personal injuries or sickness was enacted as part of the Revenue Act of 1918, 40 Stat. 1065-66 (1919), and has been retained in every codification of the tax law with essentially no change in the relevant statutory language: "[G]ross income does not include . . . the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness." Code, § 104(a)(2).[4] For the past four decades the Treasury Regulations have interpreted this exclusion to include amounts received in

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[2] (...continued)
1955-1 C.B. 213. Section 104(a)(2) or its predecessors were not cited as the basis for exemption in these rulings.

[3] Among other things, the Internal Revenue Code in effect for 1986 excluded from gross income certain prizes and awards made in recognition of religious, scientific, artistic, and similar achievement, § 74; certain group term life insurance purchased for employees, § 79; death benefits and life insurance proceeds, § 101; gifts and inheritances, § 102; interest on state and local bonds, § 103; payments received under certain accident and health plans, § 105; employer contributions to accident and health plans, § 106; income from discharge of indebtedness, § 108; certain combat pay to members of the Armed Forces, § 112; mustering-out payments for members of the Armed Forces, § 113; certain dividends received by individuals from qualifying corporations, § 116; meals and lodging furnished to employees for the convenience of their employer, § 117; and certain scholarships and fellowships, § 119.

[4] Section 213(b)(6) of the original legislation had phrased the exclusion in similar language that was retained until the enactment of the Internal Revenue Code of 1954: " '[G]ross income' does not include . . . [a]mounts received . . . as compensation for personal injuries . . . plus the amount of any damages received whether by suit or agreement on account of such injuries." Despite its slightly different wording, the 1954 codification was intended to be synonymous with the provision under prior law. H.R. Rep. No. 1337, 83d Cong., 2d Sess., *reprinted in* 1954 U.S. Code, Cong. & Admin. News, at 4168-4169.

settlement of a lawsuit involving "tort or tort type rights." Treas. Reg. § 1.104-1(c).[5]

An amount may be excluded from income under Section 104(a)(2) even though it compensates the victim for lost earnings that would have been subject to tax absent the tortious injury. *See, e.g., Norfolk & Western Ry. Co.* v. *Liepelt*, 444 U.S. 490 (1980); *Burke*, 112 S.Ct. at 1880 (O'Connor, J., dissenting); *Roemer* v. *Commissioner*, 716 F.2d 693 (9th Cir. 1983);[6] *Threlkeld* v. *Commissioner*, 87 T.C. 1294 (1986), *aff'd*, 848 F.2d 81 (6th Cir. 1988); *Wulf* v. *City of Wichita*, 883 F.2d 842 (10th Cir. 1989). Far from challenging this principle, the Internal Revenue Service embraces it. Thus, Revenue Ruling 93-88, 1993-2 C.B. 61, applied the principle in a post-*Burke* analysis of various damages under federal antidiscrimination statutes (Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 1981a, 2000e-2000e-17), the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, and Section 16 of the Civil Rights Act of 1870, 42 U.S.C. § 1981):

> Compensatory damages, including back pay, received in satisfaction of a claim of racial discrimination under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of

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[5] Petitioner erroneously dates the adoption of the pertinent regulations to 1960. Pet. Br. at 14 n. 5. The final regulations were promulgated on April 13, 1956, by Treasury Decision 6169, 21 F.R. 2432, with no changes to the relevant language in the regulations proposed on March 24, 1955. *See* 20 F.R. 1779 (1955).

[6] The position of the Internal Revenue Service is that it "will not follow the opinion of the United States Court of Appeals in *Roemer* v. *Commissioner*," Rev. Rul. 85-143, 1985-2 C.B. 55, although it is not exclusion of lost earnings with which the government quarrels, *see id.* at 56. *Roemer* was cited with apparent approval by this Court in *Burke*, 112 S.Ct. at 1871 n. 6. Presumably, the government also rejects *Threlkeld*, which was not cited in its brief.

> 1964 are excludable from gross income as damages for personal injury under Section 104(a)(2) of the Code. *This is true even if the compensatory damages in such a case are limited to back pay.*

Id. at 63 (emphasis added); *see also* Rev. Rul. 85-97, 1985-2 C.B. 50. The same point was conceded by petitioner before the court below: "[I]f . . . a victim of age discrimination has suffered a tort-type personal injury, . . . the back pay portion of an ADEA award would definitely be excludable from gross income . . . ." *Schleier* v. *Commissioner*, 5th Cir. No. 93-5555, Brief for the Appellant, at 28 n. 16; *see also Schmitz* v. *Commissioner*, 34 F.3d 790, 794 n.4 (9th Cir. 1994) ("The Commissioner . . . conced[es] that, if ADEA creates a tort-like cause of action, the Schmitzes' back pay or non-liquidated damages are excludable.").

B. Mr. Schleier Received Damages on Account of the Personal Injury of Age Discrimination.

Mr. Schleier suffered a personal injury when he became the victim of age discrimination. Petitioner concedes that "discrimination based upon age can effect 'personal' injuries" and that "personal injuries may be presumed to exist, in varying degrees, in any employment discrimination case." Pet. Br. at 10, 25 n. 15. Petitioner has not argued that Mr. Schleier did not suffer a personal injury.

This Court recognizes that age discrimination entails more than the loss of a contract right. Arbitrary age discrimination "inflict[s] on individual workers the economic *and psychological injury* accompanying the loss of the opportunity to engage in productive and satisfying occupations." *EEOC* v. *Wyoming*, 460 U.S. 226, 231 (1983) (emphasis added). Greater than the economic loss associated with age discrimination "is the cruel sacrifice in happiness and well-being which joblessness imposes on these citizens and

their families." *Western Air Lines, Inc.* v. *Criswell*, 472 U.S. 400, 410 n. 13 (1985), *quoting* H.R. Doc. No. 40, 90th Cong., 1st Sess., 7 (1967), and EEOC, *Legislative History of the Age Discrimination in Employment Act* 61 (1967). Age discrimination "can cause hardships for older persons through loss of roles," *Criswell*, 472 U.S. at 411, *quoting* H.R. Rep. No. 95-527, pt. 1, at 2 (1977), and "[has] a devastating effect on the dignity of the individual." *Criswell*, 472 U.S. at 410.[7]

The views of this Court and petitioner's concession of the personal injury of age discrimination are consistent with the legislative focus of the Age Discrimination in Employment Act of 1967, which presumed that age discrimination in employment caused human suffering.

> The financial and social costs, . . . are nothing compared with the costs in terms of human suffering and welfare which come about as the result of discriminatory practices in employment because of age. . . . Self-esteem, self-satisfaction, and personal security are important byproducts of employment in industrial America. To deny a person the opportunity to compete for jobs on the basis of ability and desire, solely because of unfounded age prejudice, is a most vicious, cruel, and disastrous form of inhumanity.

113 Cong. Rec. 34745 (December 4, 1967) (statement of Rep. Eilberg). In *The Older American Worker—Age Discrimination in Employment*, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (June 1965), the Secretary of Labor described the problems encountered by older persons in finding and

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[7] *Compare Burke*, 112 S.Ct. at 1872 ("It is beyond question that discrimination in employment on the basis of sex, race, or any of the other classifications protected by Title VII is, as respondents argue and this Court consistently has held, an invidious practice that causes grave harm to its victims.").

retaining employment. That report influenced passage of the ADEA in 1967, based on congressional findings that:

> [O]lder workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs; . . . the incidence of unemployment . . . with resultant deterioration of skill, morale, and employer acceptability is . . . high among older workers; their numbers are great and growing; and their employment problems grave.

29 U.S.C. § 621(a).

Mr. Schleier sought redress for his injuries under the ADEA, which imposes an extra-contractual duty on employers to refrain from discriminating against current or potential employees. His claims were based on age discrimination. He did not seek damages for breach of contract or for lost pension, nor did his settlement release the airline from such claims.

C. This Court's Analysis in *Burke* and the Majority of the Lower Courts That Have Considered the Issue Confirm That ADEA Damages Are Excludable from Income.

The courts of appeals for the Third, Fifth, Sixth, and Ninth Circuits, as well as the Tax Court, the Court of Federal Claims, and several district courts, have concluded that ADEA damages are excludable under Section 104(a)(2). *Schmitz* v. *Commissioner*, 34 F.3d 790; *Schleier* v. *Commissioner*, 5th Cir. 93-5555; *Pistillo* v. *Commissioner*, 912 F.2d 145 (6th Cir. 1990); *Rickel* v. *Commissioner*, 900 F.2d 655 (3d Cir. 1990); *Purcell* v. *Seguin State Bank and Trust Co.*, 999 F.2d 950 (5th Cir. 1993); *Redfield* v. *Insurance Co. of North America*, 940 F.2d 542 (9th Cir. 1991); *Bennett* v. *United States*, 30 Fed. Cl. 396 (1994), *appeal pending*, Fed. Cir. No. 94-5107; *Keller* v. *Commissioner*, 62 T.C.M. 401 (1991), *aff'd in unpublished decision*, 34 F.3d 1072 (9th Cir. 1994), *petition for cert. pending*, No. 94-944; *Rice* v. *United States*, 834 F. Supp. 1241 (E.D. Cal. 1993), *aff'd in unpublished decision*, 35 F.3d 571 (1994), *petition for cert. pending*, No. 94-944; *Klein* v. *Secretary of Transportation*, 807 F. Supp. 1517 (E.D. Wash. 1992).[8] At least two other courts of appeals have implied that they agree with the decisions excluding ADEA damages from income. *See Commissioner* v. *Miller*, 914 F.2d 586, 591 n. 8 (4th Cir. 1990); *Reese* v. *United States*, 24 F.3d 228, 234 (Fed. Cir. 1994). Other courts that have considered age discrimination claims under other state or federal laws have found the respective damages to be excludable from income. *See Abrams* v. *Lightolier*, 841 F. Supp. 584 (D.N.J. 1994) (state age discrimination statute); *Madson* v. *Commissioner*, 55 T.C.M. 1351 (1988) (age discrimination in violation of equal protection).

The Court's opinion in *Burke*, 112 S.Ct. 1867, confirms the correctness of the results reached by these courts. In the first place, *Burke* cited with approval *Rickel* v. *Commissioner*, 900 F.2d 655, the first decision to hold that lost wages[9] under the ADEA were excludable from income. *See* 112 S.Ct. at 1871 n. 6. More importantly, *Burke*'s analysis

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[8] *But see Downey* v. *Commissioner*, 97 T.C. 150 (1991), *supp. op.*, 100 T.C. 634 (1993), *rev'd*, 33 F.3d 836 (7th Cir. 1994), *petition for cert. pending*, No. 94-999; *Maleszewski* v. *United States*, 827 F. Supp. 1553 (N.D. Fla. 1993) (lost earnings and pension received in ADEA settlement, *held* includable in income); *Shaw* v. *United States*, 853 F. Supp. 1378 (M.D. Ala. 1994) (liquidated damages received in ADEA settlement, *held* includable in income, following *Maleszewski*); *Drase* v. *United States*, 866 F. Supp. 1077 (N.D. Ill. 1994).

[9] The appellate case dealt only with lost wages because the Commissioner did not appeal the holding of the Tax Court that ADEA liquidated damages were excludable from income. *Rickel*, 900 F.2d 655.

of Title VII and other remedial schemes demonstrates that Mr. Schleier's damages were received in a suit involving tort or tort-type rights. R. Wood, *Taxation of Damage Awards and Settlement Payments* at 3-12, ¶ 3.23 (1994 Supp.).[10]

Burke added a crucial insight to the jurisprudence that had emerged in prior case law. The remedial schemes in such cases as *Threlkeld*, 848 F.2d 81, had permitted courts to take for granted the presence of a personal injury (or absence, *see Starrels* v. *Commissioner*, 304 F.2d 574 (9th Cir. 1962), and the existence (or non-existence) of a tort or tort-type right. In *Burke*, however, this Court confronted an apparent paradox: an instance of discrimination that seemed to meet the *Threlkeld* definition of a personal injury as "any invasion of the rights that an individual is granted by virtue of being a person in the sight of the law," 87 T.C. at 1308 (footnote omitted), without conferring upon the victim tort-like rights of remediation.

Burke's test for exclusion under Section 104(a)(2) harmonizes the words of the statute ("damages received . . . on account of personal injuries . . .") with the language of the regulations (damages must be received through prosecution of a legal suit or action "based upon tort or tort type rights"). Interpreting "§ 104(a)(2) and applicable regulations," 112 S.Ct. at 1874, as a unity, the *Burke* majority revealed *Threlkeld*'s concept of a personal injury to be a necessary but not a sufficient condition for the exclusion of damages under Section 104(a)(2).

Burke identified two additional necessary factors: (i) the fact-finding process must provide the opportunity for a trial

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[10] The Third Circuit inferred additional support for the exclusion of ADEA damages from the legislative history of the 1989 amendment. *See Rickel*, 900 F.2d at 664.

by jury, and (ii) the spectrum of possible recoveries must do more than restore a victim's lost wages. *Burke*, 112 S.Ct. at 1873-1874; *Schmitz*, 34 F.3d at 794. The Court would not have singled out these two factors and cited their application in so many contexts if they were not of paramount importance in applying Section 104(a)(2). Moreover, when both jury trials and non-wage damages are offered by the same remedial framework, the Court regarded the combination as the hallmark of a tort-like action. *Burke*, 112 S.Ct. at 1874 n. 12.

Although the petitioner would belittle the significance of the first factor in *Burke*,[11] in fact this Court referred to jury trials six times in three pages. *See* 112 S.Ct. at 1872-1874. The opinion began its contrast of Title VII and tort-like actions with the right to a jury trial: "Title VII plaintiffs, *unlike ordinary tort plaintiffs, are not* entitled to a jury trial." 112 S.Ct. at 1872 (emphasis added). The Court used jury trials to distinguish Title VII from the other federal antidiscrimination statutes which the Court was grouping with traditional tort law. 112 S.Ct. at 1873. *Burke* pointed to the 1991 change in law permitting jury trials as one of the two indicators "signal[ling] a marked change in [Congress'] conception of the injury redressable by Title VII." 112 S.Ct. at 1874 n. 12. The fact that the fair housing pro-

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[11] Pet. Br. at 21 n. 11. Petitioner's assertion that a jury trial is a neutral factor also present in contract actions fails to account for why *Burke* emphasized the absence of a jury trial from pre-1991 Title VII and its presence in more tort-like antidiscrimination statutes. To the extent petitioner reduces ADEA damages to contract damages, petitioner ignores the fact that the ADEA imposes a "duty not to discriminate . . . regardless of the parties' contractual relationship." *Schmitz*, 34 F.3d at 793. On the other hand, her claim that ADEA liquidated damages are punitive disqualifies them as a contractual remedy. *Restatement (Second) of the Law of Contracts* at § 356 (1979).

visions of Title VIII of the Civil Rights Act of 1968 included a right to a trial by jury was cited by the Court as a reason why Title VIII "sounds basically in tort." 112 S.Ct. at 1874.

According to *Burke*'s interpretation of the second factor, Section 104(a)(2) requires the remedial scheme to include some redress which does more than restore the victim's lost wages. The Court did not conclude that a statute had to offer the *full* range of monetary remedies featured in the most comprehensive tort laws before it could be considered an action for personal injury under Section 104(a)(2):[12]

> The Court previously has observed that Title VII focuses on "legal injuries of an economic character," see *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975), consisting specifically of the unlawful deprivation of full wages earned or due for services performed, or the unlawful deprivation of the opportunity to earn wages through wrongful termination. The remedy, correspondingly, consists of restoring victims, through backpay awards and injunctive relief, to the wage and employment positions they would have occupied absent the unlawful discrimination. See *id.*, at 421, 95 S.Ct. at 2373 citing (118 Cong. Rec. 7168 (1972)). *Nothing* in this remedial scheme purports to recompense . . . for *any* of the traditional harms associated with personal injury, *such as* pain and suffering, emotional distress, harm to reputation, *or other consequential damages*.

[12] *Burke* "does not require that a statute provide the complete spectrum of tort remedies before it may be deemed to redress a tort type injury." *Bennett* v. *United States*, 30 Fed. Cl. at 400. As Justice Souter cautioned, "[i]n those States that have barred recovery in tort for 'intangible elements of injury,' . . . the modified action is still fairly described as one 'based upon tort rights,' and certainly is an action based upon tort-type rights." *Burke*, 112 S.Ct. at 1877 n. (Souter, J., concurring).

112 S.Ct. at 1873 (emphasis added). By this language, the Court acknowledged that discrimination could constitute a personal injury for purposes of Section 104(a)(2) if the relevant cause of action evidenced a tort-like conception of injury and remedy, and cited federal anti-discrimination statutes as illustrations of possibly qualifying remedial schemes. *Id.* at 1873-1874.

In contrast to pre-1991 Title VII remedies, ADEA liquidated damages satisfy the *Burke* requirement for a range of non-wage damages, 29 U.S.C. § 626(b), by compensating injured persons for damages "which are too obscure and difficult to prove." *Schmitz*, 34 F.3d at 794.[13] Consonant with "the economic and psychological injury" of age discrimination, *EEOC* v. *Wyoming*, 460 U.S. at 231, and its "devastating effect on the dignity of the individual," *Criswell*, 472 U.S. at 410, the ADEA authorized victims of age discrimination to recover additional damages by reference to a pre-existing provision of the Fair Labor Standards Act that had been interpreted to connote "damages too obscure and difficult of proof for estimate other than by liquidated damages." *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 707 (1945) (citations omitted); *Overnight Motor Transportation Co., Inc.* v. *Missel*, 316 U.S. 572, 583-584 (1942)

[13] Petitioner erroneously portrays *Schmitz* as having rejected a punitive role for ADEA liquidated damages: "The [*Schmitz*] court stated that liquidated damages under the ADEA are compensatory *rather than* punitive . . . ." Pet. Br. at 9 (emphasis added). However, nothing in the *Schmitz* opinion supports petitioner's misreading. On the contrary, the Ninth Circuit Court of Appeals took pains to stress that "[t]he case law and legislative history indicate that ADEA liquidated damages have a compensatory *as well as a punitive purpose*." 34 F.3d at 793 (emphasis added). "[W]e do not agree that ADEA liquidated damages are *solely* punitive in nature . . . ." *Id.* at 794 (emphasis added). "ADEA liquidated damages likely also have a punitive purpose . . . ." *Id.* at 795.

("[L]iquidated damages . . . are compensation, not a penalty or punishment by the Government. . . . The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages.").[14]

If Congress had wished to provide for an exclusively punitive remedy in the ADEA, it could just as easily have authorized victims of age discrimination to recover "fines," "penalties," "exemplary damages," or "punitive damages." Instead, Congress chose "liquidated damages," a pre-existing term of art under the FLSA. The ADEA's "remedial provisions incorporate by reference the provisions of the Fair Labor Standards Act of 1938," *McKennon* v. *Nashville Banner Pub. Co.*, No. 93-1543, slip op. at 4 (S.Ct. January 23, 1995), ". . . to the greatest extent possible." *Lorillard* v. *Pons*, 434 U.S. 575, 582 (1978). Having incorporated those provisions, it is fair to assume that Congress intended to adopt existing interpretations of the meaning of those provisions. *Standard Oil* v. *United States*, 221 U.S. 1, 59 (1911); *Gilbert* v. *United States*, 370 U.S. 650, 655 (1962).

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[14] Congress stated it was relying on this view when it amended the ADEA in 1978:

> The ADEA as amended by this act does not provide remedies of a punitive nature. The conferees therefore agree to permit a jury trial on the factual issues underlying a claim for liquidated damages *because* the Supreme Court has made clear that an award of liquidated damages under the FLSA is not a penalty but rather is available in order to provide full compensatory relief for losses that are "too obscure and difficult of proof for estimate other than by liquidated damages." *Overnight Transportation Company [sic]* v. *Missel*, 316 U.S. 572, 583-84 (1942).

H.R. Rep. 95-950 (conf.) at 13, 14 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 528, at 535 (emphasis added); *see also* 124 Cong. Rec. S4449 (daily ed. March 23, 1978) (statement of Sen. Williams).

ADEA liquidated damages thus bear a close resemblance to presumed damages:

> Presumed damages are a *substitute* for ordinary compensatory damages, not a *supplement* for an award that fully compensates the alleged injury. When a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish, some form of presumed damages may possibly be appropriate. . . . In those circumstances, presumed damages may roughly approximate the harm that the plaintiff suffered and thereby compensate for harms that may be impossible to measure.

Memphis Community School Dist. v. *Stachura*, 477 U.S. 299, 310 (1986) (citations omitted; emphasis in original).[15] In contrast to pre-1991 Title VII, the ADEA "purports to recompense . . . for . . . other consequential damages." *Burke*, 112 S.Ct. at 1873.

Moreover, *Burke* acknowledged the possibility that a remedial scheme providing for damages of a punitive character could satisfy the requisite tort-like framework for purposes of Section 104(a)(2): "[I]n contrast to the tort remedies for physical and non-physical injuries discussed above, Title VII does not allow awards for compensatory *or* punitive damages." 112 S.Ct. at 1873 (emphasis added). Congress' decision to permit jury trials and compensatory "as well as punitive damages" under the Civil Rights Act of 1991 signaled a marked change in its conception of the injury redressable by Title VII. 112 S.Ct. at 1874 n. 12. The Court

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[15] The government's misconception that excludable Section 104 (a)(2) damages must separately compensate for intangible injury leads it to cite such cases as *Hill* v. *Spiegel, Inc.*, 708 F.2d 233 (6th Cir. 1983), for the proposition that evidence of intangible injury is not admissible in ADEA cases. Pet. Br. at 18-19. However, that simply begs the question of whether ADEA remedies already include presumed damages for intangible harms.

pointed out that Title VIII of the Civil Rights Act of 1968 sounded basically in tort, combining jury trials with awards of compensatory "and punitive damages." 112 S.Ct. at 1874. These observations are consistent with the previously expressed view of this Court that "[p]unitive damages have long been a part of traditional state tort law." *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). Thus, petitioner's argument that ADEA liquidated damages punish highlights an additional tort-like facet of the ADEA.[16]

The ADEA offers both jury trials and non-wage damages. 29 U.S.C. §§ 626(b), 626(c). "ADEA's liquidated damages provision, as well as its provision for jury trials, distinguishes ADEA from the statute discussed in *Burke*." *Schmitz*, 34 F.3d at 793. Therefore, by application of the *Burke* criteria sought for but not found under pre-1991 Title VII, the damages received by Mr. Schleier on account of his personal injuries were also received in prosecution of a suit based on tort-type rights.

D. The Policy of Section 104(a)(2) Justifies Exclusion of ADEA Damages from Gross Income.

A clear understanding of the policy of Section 104(a)(2) is essential to a consistent application of the exclusion. However, the legislative reason for retaining the exclusion for personal injury damages has evolved since the House Ways and Means Committee provided the following explanation for the enactment of Section 213(b)(6) of the Revenue Act of 1918:

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[16] Before the court below, petitioner had conceded that the awarding of liquidated damages "on a punitive damages standard" was a " 'tort-like' aspect of the ADEA." *Schleier*, 5th Cir. No. 93-5555, Reply Brief for the Appellant at 14.

> Under the present law it is doubtful whether amounts received through accident or health insurance, or under workmen's compensation acts, as compensation for personal injury or sickness, and damages received on account of such injuries or sickness, are to be included in gross income. The proposed bill provides that such amounts shall not be included in gross income.

H.R. Rep. No. 767, 65th Cong., 2d Sess., at 9-10 (1918), *reprinted in* 1939-1 C.B. (Pt. 2) at 92. The policy that personal injury[17] damages should not be taxed appears to have originated in a mistaken notion that they could not be taxed, reflecting the narrow definition of income as "gain derived from capital, from labor, or from both combined," that was endorsed by this Court in *Eisner* v. *Macomber*, 252 U.S. 189, 207 (1920), citing *Doyle* v. *Mitchell Bros. Co.*, 247 U.S. 179, 185 (1920), and *Stratton's Independence* v. *Howbert*, 231 U.S. 399, 415 (1913); *see also* B. Bittker & L. Lokken, *Federal Taxation of Income, Estates and Gifts*, ¶¶ 5.1, 5.6 (2d ed. 1989).

In 1918 the Commissioner of Internal Revenue had stated:

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[17] The Revenue Act of 1918 did not define "personal injuries." However, accepted legal usage understood the phrase to encompass both tangible and intangible harms. *See e.g.*, *Black's Law Dictionary* 627 (2d ed. 1910):

> [T]he term is also used (chiefly in statutes) in a much wider sense, and as including any injury which is an invasion of personal rights, and in this signification it may include such injuries as libel or slander, criminal conversation with a wife, seduction of daughter, and mental suffering.

Accord, *Black's Law Dictionary* 967 (3d ed. 1933); *Vicksburg & Meridian R.R.* v. *Putnam*, 118 U.S. 545, 554 (1886); *Garrison* v. *Burden*, 40 Ala. 513, 516 (1867); *Bennett* v. *Bennett*, 116 N.Y. 584, 587 (1889); *Williams* v. *Williams*, 20 Col. 51, 67 (1894); *Morton* v. *Western Union Telegraph Co.*, 130 N.C. 299, 302 (1902); *McDonald* v. *Brown*, 23 R.I. 546, 549-550 (1902).

> The Attorney General has advised upon the basis of recent decisions of the Supreme Court . . . and it is accordingly held that the proceeds of an accident insurance policy received by an individual on account of personal injuries sustained by him through accident are not income under the [Revenue Acts of 1916 and 1917].
>
> It is held upon similar principles that an amount received by an individual as the result of a suit or compromise for personal injuries sustained by him through accident is not income taxable under the provisions of said Titles.

Treasury Decision 2747 (July 12, 1918), *reprinted in Income Tax Service 1918* ¶ 3605 (Corporation Trust Company 1918). Combining at times a metaphor of "human capital" with the narrow view of income, early administrative interpretations converged on the view that damages for intangible personal injuries were not taxable, after initially reaching a contrary conclusion.[18]

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[18] Petitioner erroneously suggests that between 1920 and 1972 the Internal Revenue Service regarded damages for intangible injuries as taxable. *See* Pet. Br. at 12 n. 3. Sol. Mem. 1384, 2 C.B. 71 (1920), had taken the view that "alienation of a wife's affections is a personal injury" and that the statutory language "would seem to include any personal injury," but it declined to apply the exclusion, on the ground that a wife's affections did not constitute capital. However, Sol. Mem. 1384 was soon abandoned. *See* Sol. Op. 132, I-1 C.B. 92, 93 (1922), where the government held that damages for libel and for alienation of affections were not taxable under prevailing concepts of income and the Sixteenth Amendment. Sol. Op. 132 was incorrectly cited by petitioner as though it continued the position of Sol. Mem. 1384, whereas it formally revoked the latter. Petitioner compounds her error of misapprehending the significance of Sol. Op. 132 by suggesting that the "physical injury only" view held sway until a 1972 acquiescence. That this is a mistake may be seen from Rev. Rul. 58-418, 1958-2 C.B. 18, 19 (portion of libel settlement held excludable from income), *superseded by* Rev. Rul. 85-98, 1985-2 C.B. 51; *see also Seay* v. *Commissioner*, 58 T.C. 32, 40 (1972) ("[the government (continued...)

The early view of income as gain from capital or labor has been displaced by an all-embracing concept of income as "any accession to wealth." *Glenshaw Glass Co.*, 348 U.S. at 431; *Commissioner* v. *Kowalski*, 434 U.S. 77, 94 (1977). There can no longer be any suggestion that the Section 104(a)(2) exclusion is grounded in a limitation on the reach of "income."

Modern courts have noted the role of compassion in Section 104(a)(2). In his dissenting opinion in *Norfolk & Western Ry. Co.*, 444 U.S. at 501, Justice Blackmun suggested two probable reasons for the exclusion of wrongful death awards: In addition to simplifying a potentially complex and administratively burdensome system, "Congress may have intended to confer a humanitarian benefit on the victim or victims of the tort." *Id.* The Ninth Circuit Court of Appeals has explained the justification for Section 104(a)(2) similarly:

> The rationale behind the exclusion of the entire award is apparently a feeling that the injured party, who has suffered enough, should not be further burdened with the practical difficulty of sorting out the taxable and nontaxable components of a lump-sum award.

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[18] (...continued)
has] long recognized that [damages for intangible personal injuries] were exempt from taxation"). In fact, the Service had acquiesced in the tax-free treatment of libel damages at least as early as 1928, consistent with Sol. Op. 132. VII-1 C.B. 14 (1928) (acquiescence in *Hawkins* v. *Commissioner*, 6 B.T.A. 1023 (1927)). Even Rev. Rul. 74-77, 1974-1 C.B. 33, acknowledged that the position stated in Sol. Op. 132 was "set forth under the current statute and regulations in this Revenue Ruling," which reiterated the view that damages for alienation of affections or for the surrender of the custody of a minor child were excludable under Section 104(a)(2).

Roemer, 716 F.2d at 696. "Congress in its compassion has retained the exclusion (now codified at I.R.C. § 104(a)(2))." *Id.* n. 2.

Several courts have relied on a "return of capital"[19] metaphor to distinguish the exclusion of compensatory damages from the taxation of purely punitive damages. *See Hawkins* v. *Commissioner*, 30 F.3d 1077 (9th Cir. 1994), *petition for cert. pending*, No. 94-1041; *Reese* v. *United States*, 24 F.3d 228 (Fed. Cir. 1994). Others have stated more generally that a return of capital analogy justifies the Section 104(a)(2) exclusion because damages for personal injuries do not generate a gain or profit but only make the victim whole by compensating for a loss. *See, e.g., Starrels*, 304 F.2d at 576.[20] However, only a view of Section 104(a)(2) as legislative compassion can withstand intellectual scrutiny and be reconciled with the treatment of personal injury damages in the case law.

To begin with, any presumption that personal injuries do not generate a gain conflicts with *Glenshaw Glass Co.* because it suggests that Section 104(a)(2) implements an

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[19] The concept of return of financial capital is codified under Section 1001 and related sections, where "adjusted basis," Code § 1011, represents investment in property that has already been taxed and that must accordingly be subtracted from gross sales proceeds in order to determine the amount of gain realized. Treas. Reg. § 1.1001-1(a). "Capital" is exempt from tax when it is "returned" only to the extent it has an adjusted tax basis. Treas. Reg. § 1.1001-1(c).

[20] In the court below, the Commissioner conceded that the Section 104(a)(2) had been retained out of Congressional compassion but also averred that damages for personal injuries do not generate a gain or profit but only make the taxpayer whole by compensating for a loss. *Schleier*, 5th Cir. No. 93-5555, Brief for Appellant at 10.

inherent limitation on the scope of "income."[21] Human beings have no tax basis in their health or personal interests. *Roemer*, 716 F.2d at 696 n. 2. Even if they did, damages in excess of such basis should be taxable as gain,[22] unless Congress is presumed to have avoided administrative difficulties by retaining Section 104(a)(2) without dollar limits. However, the theory would then endow every human being at birth with a hypothetical, potentially infinite amount of previously taxed personal capital.[23]

The return of capital analogy also conflicts with judicial precedent and administrative practice permitting the exclusion of personal injury damages based on lost earnings. *Burke* at 1880, (O'Connor, J., dissenting); *Schmitz*, 34 F.3d 790; *Roemer*, 716 F.2d 693; *Threlkeld*, 848 F.2d 81; *Wulf*, 883 F.2d 842. Revenue Ruling 93-88, 1993-2 C.B. 61, and Rev. Rul. 85-97, 1985-2 C.B. 50, would be indefensible if

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[21] The Court's observation in *Glenshaw Glass Co.* of a "long history of departmental rulings holding personal injury recoveries nontaxable on the theory that they roughly correspond to a return of capital," 348 U.S. at 432 n. 8, "was probably intended only to distinguish the rulings, not to endorse them." Bittker & Lokken, *Federal Taxation of Income, Estates and Gifts* at 5-41.

[22] The general basis recovery rules do not distinguish between voluntary and involuntary sales. Code §§ 1001, 1011. If similar treatment applied to corporeal capital, then a person who sold her own blood and "suffered pain and discomfort as the necessary and inevitable corollary of the means by which she chose to make her living," *United States* v. *Garber*, 589 F.2d 843, 847, *rev'd on other grounds*, 607 F.2d 92 (5th Cir. 1979), should be able to exclude the payments from her income. However, the courts reject the tax-free contractual recovery of human capital. 589 F.2d at 847. *Garber* noted without apparent disagreement the return of capital rationale, but it rested its holding on the absence of a tort. *Id.*

[23] Additional objections are noted in Dodge, *Taxes and Torts*, 77 Cornell L. Rev. 143, 152-154 (1992); Burke & Friel, *Tax Treatment of Employment-Related Injury Awards: The Need for Limits*, 50 Mont. L. Rev. 13, 52 (1989).

Section 104(a)(2) were based on a return of capital. "We doubt whether the return of capital theory justifies the exclusion from income of the full range of damages found to be excludable under section 104(a)(2), particularly damages received in lieu of lost income." *Downey*, 97 T.C. at 159.

On the other hand, a rationale for Section 104(a)(2) based on legislative compassion for tort victims avoids the conceptual difficulties of equipping each taxpayer with an infinite amount of previously taxed capital. Compassion for tort victims better accounts for the outcomes in *Garber*, 589 F.2d 843, and *Starrels*, 304 F.2d 574, by requiring the existence of a tort or tort-like event. Furthermore, it explains why, in appropriate circumstances, damages measured by lost earnings may be excluded from gross income.

No rational policy justifies denying to victims who seek relief for age discrimination under the ADEA the same compassionate treatment accorded plaintiffs under other federal antidiscrimination statutes, Rev. Rul. 93-88, 1993-2 C.B. 61, other state and federal age discrimination laws, *Abrams*, 841 F. Supp. 584, and *Madson*, 55 T.C.M. 135, and tort laws generally. In this case the focus of the tax statute furthers the humanitarian objectives of the ADEA.

II.

PETITIONER'S LITIGATING POSTURE IS WRONG AS A MATTER OF LAW AND FAILS AS POLICY.

A. Petitioner Mistakenly Relies on the Portal-to-Portal Act and *Thurston* to Extinguish a Dual Compensatory/ Deterrent Role for ADEA Liquidated Damages.

The official view of the Internal Revenue Service for the past quarter-century repudiates petitioner's litigating theory (Pet. Br. at 21-24) that the Portal-to-Portal Act of 1947 (Act of May 14, 1947, ch. 52, § 11, 61 Stat. 89) changed the character of FLSA liquidated damages from compensatory

to punitive, making it "anachronistic error" to rely on *Brooklyn Savings Bank*, 324 U.S. 697, and *Overnight Motor Transportation Co., Inc.*, 316 U.S. 572. In Revenue Ruling 69-581, 1969-2 C.B. 25, 26, which has never been revoked but rather continues to inform agency policy,[24] the Service unequivocally stated its interpretation that FLSA liquidated damages are not punitive but compensatory:

> The provisions of section 16(b) of the Fair Labor Standards Act of 1938, [sic] are not penal in nature. The liquidated damages provided for therein constitute compensation for delay in the payment of sums due under the Act. See *Overnight Motor Transportation Co., Inc.*, v. *Missel*, . . . and *Brooklyn Savings Bank* v. *O'Neil*.

Petitioner's claim, newly adopted for this Court,[25] is also

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[24] The Internal Revenue Service has relied on the ruling's interpretation of the FLSA, *see* LTR 7923029 (March 7, 1979) ("The liquidated damages provided for in section 16(b) of the Fair Labor Standards Act of 1938 constitute compensation for delay in the payment of sums due under the Act."), and its holding generally, *see* LTR 9424008 (March 14, 1994) (deductibility of personal injury settlements). Written determinations may not be cited or relied on as precedents except by the taxpayers to whom they are issued. Code § 6110(j)(3). However, they are published by the Internal Revenue Service and they may illuminate the policies of the government. Furthermore, they may be helpful in establishing consistency of administrative treatment. *Rowan Companies* v. *United States*, 452 U.S. 247, 261 n. 17 (1981). Before the court below, petitioner herself cited *Brooklyn Savings Bank* and *Overnight Motor Transportation Co., Inc.* in support of her statement that FLSA damages are compensatory. *Schleier*, 5th Cir. No. 93-5555, Brief for the Appellant at 25.

[25] If the government's contention that *Schmitz* "erred in relying on *Brooklyn Savings Bank* and *Overnight Motor Transportation*," Pet. Br. at 21, is intended to suggest that the government had raised its Portal-to-Portal Act theory before that court, there is no evidence thereof. Similarly, the Fifth Circuit Court of Appeals had no opportunity to consider petitioner's new argument, but could reasonably have understood her to have been reaffirming

(continued...)

contradicted by long-standing views of the courts, which "have relied on the ADEA's incorporation of FLSA remedies, *see Brooklyn [Savings] Bank* v. *O'Neil*, . . ." *Powers* v. *Grinnell Corp.*, 915 F.2d 34, 39 n. 6 (1st Cir. 1990), or held FLSA liquidated damages to be compensatory.[26]

The function of petitioner's Portal-to-Portal Act theory is to supply the needed "statutory context," Pet Br. at 22-23, to allow her to argue that at the time the ADEA liquidated damages remedy was enacted, it could inherit nothing but a punitive residue from FLSA liquidated damages. Petitioner concedes thereby not only the relevance of the FLSA "statutory context" but also the fact that ADEA liquidated damages derive part of their character from FLSA damages. However, these concessions, when combined with Rev. Rul. 69-581, 1969-2 C.B. 25, negate any claim of an exclusively punitive role for ADEA liquidated damages.

As petitioner seems to recognize, *Thurston*, 469 U.S. 111, did not erase the pre-ADEA "statutory context." Rather:

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[25] (...continued)
the rationale of Rev. Rul. 69-581. *See* Schleier, 5th Cir. No. 93-5555, Brief for the Appellant at 25.

[26] *See also Brock* v. *Superior Care, Inc.*, 840 F.2d 1054, 1064 (2d Cir. 1988); *Martin* v. *Selker Bros., Inc.*, 949 F.2d 1286, 1299 (3d Cir. 1991); *Hamilton* v. *1st Source Bank*, 895 F.2d 159, 166, *vacated in part on rehearing and remanded*, 928 F.2d 86 (4th Cir. 1990); *Reich* v. *Tiller Helicopter Services, Inc.*, 8 F.3d 1018, 1031 (5th Cir. 1993); *Lilley* v. *BTM Corp.*, 958 F.2d 746, 755 (6th Cir. 1992); *Coston* v. *Plitt Theatres, Inc.*, 831 F.2d 1321, 1336 (7th Cir. 1987), *cert. denied*, 485 U.S. 1007 (1988); *Hultgren* v. *County of Lancaster*, 913 F.2d 498, 509 (8th Cir. 1990); *Schmitz* v. *Commissioner*, 34 F.3d 790, 793 (9th Cir. 1994); *EEOC* v. *Prudential Federal Savings and Loan Association*, 763 F.2d 1166, 1174 (10th Cir.), *cert. denied*, 474 U.S. 946 (1985); and *Joiner* v. *City of Macon*, 814 F.2d 1537, 1539 (11th Cir. 1987).

> With its focus only on whether "willfulness" is essential to an award of liquidated damages, *Thurston* simply observes that liquidated damages serve a punitive function. *Thurston* did not concern, and does not intimate, whether liquidated damages under the ADEA simultaneously serve the compensatory function of indemnifying employees for prejudgment delays in recouping their back pay.
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> . . .
>
> [W]hile liquidated damages serve a *deterrent or punitive function*, Congress also intended liquidated damages to serve as *compensation* for a discharged employee's nonpecuniary losses arising from the employer's willful misconduct.

Powers, 915 at 41, 42 (emphasis in original), quoting *Graefenhain* v. *Pabst Brewing Co.*, 870 F.2d 1198, 1205 (7th Cir. 1989). The legislative history of the 1978 amendments to the ADEA also belies petitioner's reading of the Portal-to-Portal Act and the ADEA. H.R. Rep. 95-950 (conf.) at 13, 14 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 528, at 535.

Petitioner's reliance on the mere enactment of the Portal-to-Portal Act is misplaced. By providing employers with an opportunity[27] to reduce their liability for liquidated damages, the 1947 law was attempting to relieve employers and the national economy of "wholly unexpected liabilities, immense in amount and retroactive in operation . . . ." 29 U.S.C. § 251(a). In so doing, the Portal-to-Portal Act converted the standard of liability for FLSA liquidated damages from strict liability to a statutorily-defined "reasonable

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[27] The ultimate determination of whether the employer should be relieved of liability for FLSA liquidated damages is still within the "sound discretion" of the court. 29 U.S.C. § 260; *Thompson* v. *Sawyer*, 678 F.2d 257 (D.C. Cir. 1982) (Equal Pay Act).

employer" standard. However, that does not mean FLSA liquidated damages thereby became punitive, any more than the existence of a reasonable person standard converts tort damages under the common law of negligence into a punitive remedy. *See* W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts*, § 30 (5th ed. 1989).

Petitioner's single, lodestar case interpreting the tax treatment of ADEA damages raises more questions than it answers. *See Downey*, 33 F.3d 836. The Seventh Circuit did not cite the prior decisions of the Fifth Circuit[28] and made no attempt to deal with this Court's full analysis in *Burke*, ignoring the role of jury trials as if it had determined *sub silentio* this Court's discussion to be an irrelevancy. Instead, *Downey* misconstrued *Burke* to require the existence of separate compensation for intangible injury as a necessary condition for excluding personal injury damages. 33 F.3d at 839, 840. Continuing its disregard for the teachings of this Court, the Seventh Circuit did not even cite *Thurston*, much less reconcile with it *Downey*'s apparent equation of ADEA liquidated damages with prejudgment interest, 33 F.3d at 840, or the Seventh Circuit's view of ADEA liquidated dam-

[28] *Downey*'s analysis seems to have been colored by its mistaken perception that no other post-*Burke* appellate courts had ruled on the tax treatment of ADEA damages, *see* 33 F.3d at 838, an unfortunate lapse if true, because the court might have made a more thorough inquiry if it had known of the issuance of *Purcell* and *Schleier* from a circuit otherwise sympathetic to the Seventh Circuit's view that ADEA liquidated damages preclude the recovery of prejudgment interest. *Compare Fortino* v. *Quasar Co.*, 950 F.2d 389, 397-398 (7th Cir. 1991), *with McMann* v. *Texas City Refining, Inc.*, 984 F.2d 667, 673 (5th Cir. 1993).

ages as a contractual remedy.[29] However, the ADEA imposes a "duty not to discriminate . . . regardless of the parties' contractual relationship; ADEA applies not only to firing and promotion decisions, but also to hiring decisions, when no contract exists." *Schmitz*, 34 F.3d at 793. Unlike contract damages, ADEA liquidated damages are not "liquidated in the contract." *Restatement (Second) of the Law of Contracts* at § 356 (1979).

Petitioner fails to heed this Court's jurisprudence concerning compensation and punishment. Contending that ADEA liquidated damages have no compensatory function and that they are not "on account of" the discrimination victim's injury, the government is attempting to resurrect the unrealistic conception of punitive damages rejected in *Molzof* v. *United States*, 112 S.Ct. 711 (1992), where it had argued that the standard for identifying punitive damages under the Federal Tort Claims Act, *see* 28 U.S.C. § 2674, was whether such "damages . . . are in excess of, or bear no relation to, compensation. . . . In the government's view, there is a strict dichotomy between compensatory and punitive damages . . . ." 112 S.Ct. at 715. This Court declined to equate "punitive damages" with "damages that have punitive effect," explaining: "[D]amages that are not legally considered 'punitive damages,' but which are for some reason above and beyond ordinary notions of compensation . . . . [are] in the 'gray' zone [and] are not by definition 'punitive damages' . . . ." 112 S.Ct. at 716. In doing so, *Molzof* anticipated the potential misuse of the government's argument in the context of ADEA liquidated damages:

[29] Ironically, by invoking the "difficult to prove losses" standard, *Downey* also placed itself at odds with petitioner's argument that the Portal-to-Portal Act and the enactment of the ADEA left no room for the "anachronistic error" of relying on *Brooklyn Savings Bank* and *Overnight Motor Transportation Co., Inc.*

> The Government's reading of the statute also would create problems in liquidated damages cases and in other contexts in which certain kinds of injuries are compensated at fixed levels that may or may not correspond to a particular plaintiff's actual loss.

112 S.Ct. at 717.

Petitioner's oversimplistic dichotomy strictly separating compensatory from punitive damages finds no support in the teachings of this Court. Just as a remedial scheme may have dual goals of deterrence and compensation, *see McKennon*, slip op. at 5 ("The private litigant who seeks redress for his or her injuries vindicates both the deterrence and the compensation objectives of the ADEA."), so, too, may a specific remedy. "To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages." *Carey* v. *Piphus*, 435 U.S. 247, 256-257 (1978). "Deterrence is also an important purpose of this system, but it operates through the mechanism of damages that are *compensatory* . . . ." *Memphis Community School Dist.*, 477 U.S. at 307 (emphasis in original). "Section 1983 presupposes that damages that compensate for actual harm ordinarily suffice to deter constitutional violations." *Id.* at 310. This Court's prior analyses are consistent with that of the Ninth Circuit Court of Appeals:

> In enacting ADEA, Congress was likely attempting to balance the need to compensate victims and deter discrimination with the need to protect businesses from crushing liability. Unlike the concurrence, we see nothing "peculiar" in Congress's decision to resolve these competing interests by compensating victims of willful discrimination at a higher rate than victims of non-willful discrimination: Congress has simply decided as

> a public policy matter that only victims of willful discrimination should receive obscure and difficult to prove compensatory damages.

Schmitz v. *Commissioner*, 34 F.3d at 795.

B. Petitioner's Various Erroneous and Inconsistent Positions Impose an Incoherent, Unworkable, and Unfair Test for Applying Section 104(a)(2).

Petitioner historically has had difficulty sustaining a coherent explanation of how Section 104(a)(2) or its predecessors should be applied. For example, the Internal Revenue Service has entertained differing views as to whether damages for non-physical injuries are taxable;[30] whether punitive damages in tort cases are excludable from income;[31] and whether FLSA liquidated damages are compensatory or penal.[32]

In fact, petitioner has been unable to maintain a consistent view on ADEA damages in this case. Petitioner's claim that ADEA back pay "and *liquidated damages compensate* for economic losses . . . ." Pet. Br. at 17 (emphasis added),[33]

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[30] *Compare* Sol. Op. 132, I-1 C.B. 92 (1922), *superseded by* Rev. Rul. 74-77, 1974-1 C.B. 33, *and* VII-1 C.B. 14, *with* Sol. Mem. 957, 1 C.B. 65 (1919), *and* Sol. Mem. 1384, 2 C.B. 71 (1920).

[31] *Compare* Rev. Rul. 58-578, 1958-2 C.B. 38, *and* Rev. Rul. 75-45, 1975-1 C.B. 47, *with* Rev. Rul. 58-418, 1958-2 C.B. 18, *and* Rev. Rul. 84-108, 1984-2 C.B. 32.

[32] *Compare* Rev. Rul. 69-581, 1969-2 C.B. 25, *with* Pet. Br. at 21-24.

[33] It is not clear whether petitioner thereby intends to resuscitate the argument that liquidated damages under 29 U.S.C. § 216(b), when cross-referenced by the Equal Pay Act, "are in the nature of interest on the back pay," a view rejected by the Fourth Circuit in *Thompson* v. *Commissioner*, 89 T.C. 632, 648 (1987), *aff'd*, 866

(continued...)

contradicts her assertion that "ADEA liquidated damages . . . are not compensatory," Pet. Br. at 20, as well as her statement before the Fifth Circuit Court of Appeals that "[i]n candor, we believe that the correct view is that ADEA liquidated damages are strictly punitive." *Schleier* v. *Commissioner*, 5th Cir. No. 93-5555, Brief for the Appellant at 27 n. 15; *see also Schmitz*, 34 F.3d at 793 ("The Commissioner argues that ADEA liquidated damages represent only punitive damages . . . ."). Petitioner's schizophrenic view of ADEA liquidated damages also undermines her criticism of the Fourth Circuit for recognizing a dual compensatory/punitive role for liquidated damages. Pet. Br. at 26 n. 17. Petitioner's claim that "liquidated damages" are a remedy for breach of contract, *see* Pet. Br. at 21 n. 11, in support of which she cites a non-ADEA case, *Rex Trailer Co., Inc.* v. *United States*, 350 U.S. 148 (1956), cannot be reconciled with her contentions that ADEA liquidated damages are exclusively punitive. Contractual remedies do not allow for punitive damages. *Restatement (Second) of the Law of Contracts*, § 356, comment a (1979).

In light of these past and present inconsistencies, no special deference should be accorded to the petitioner here, should any be claimed. Deference "to agencies' 'reasonable' interpretations of their own statutes, . . . cannot be invoked where an agency is still considering what interpretation it will ultimately adopt." *Conecuh-Monroe Community Action Agency* v. *Bowen*, 852 F.2d 581, 586 (D.C. Cir. 1988).

> Nor is the administrative interpretation, having been arrived at more than 60 years after the adoption of the statute, either contemporaneous [citations omitted] or

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[33] (...continued)
F.2d 709 (4th Cir. 1989). Interest on a fixed sum is one of the easiest damage measures to calculate.

> long standing [citations omitted]. Finally, the agency's interpretation has not been consistent. [Citations omitted.]
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> . . .
>
> [I]nconsistent agency pronouncement hardly adds weight to the interpretation of the Act the Commission now urges on the court.

F.T.C. v. *Miller*, 549 F.2d 452, 457, 459-460 (7th Cir. 1977). Indeed, the Internal Revenue Service is entitled to no deference whatsoever in its interpretations of a statute which it does not administer. *Department of Treasury* v. *FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988); *accord*, *Dept. of Navy, Military Sealift Command* v. *FLRA*, 836 F.2d 1409, 1410 (3d Cir. 1988).

Petitioner's all-or-nothing test would deny the Section 104(a)(2) exclusion to any remedial scheme that does not offer a complete spectrum of tort recoveries, *see Bennett*, 30 Fed. Cl. at 400, or that does not include standalone causes of action permitting the recovery of damages for intangible injuries. Not only is this extremism alien to *Burke*; it will discourage states in their roles as social laboratories from engaging in "novel social and economic experiments," *see New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), as they proceed with tort reform initiatives limiting recoveries for pain, suffering, and other intangible injuries, as well as punitive or exemplary damages.[34] Jurisdictions that reduce tort recoveries while re-

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[34] *See e.g.*, Ohio Rev. Code § 2744.05 (1992) (victims of tortfeasors that are "political subdivisions" may not recover punitive or exemplary damages, or damages for "pain and suffering, for the loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education of the person injured, for mental anguish, or for any other intangible loss"). "The purpose of [this provision] is to per-
(continued...)

taining a tort framework[35] are entitled to rely on the Treasury Regulation's linkage of excludable personal injury damages to "torts or tort type rights."[36] However, petitioner's all-or-nothing theory subverts the regulation by threatening a federal tax (and also, usually, a state tax) on tort victims who receive reduced "tort-type" damages but who are not otherwise being singled out by the state for adverse tax treatment. Similarly, states experimenting with damage limitations in restitutionary payments[37] and wishing to rely on the exemption from federal income tax extended to certain victim restitution payments, *see* Rev. Rul. 74-74,

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[34] (...continued)
mit recovery by injured persons for *torts* committed by political subdivisions while at the same time conserving the fiscal resources of those political entities." *Galanos* v. *City of Cleveland*, 70 Ohio St. 3d 220, 221, 638 N.E.2d 530, 532 (1994) (emphasis added).

[35] *See, e.g.*, Colo. Rev. Stat. § 13-10-101; *compare Burke*, 112 S.Ct. at 1877 (Souter, J., concurring).

[36] By incorporating "tort or tort-type rights" into its test, the regulation brings concepts from the common law and state statutes into what might otherwise be an exclusively federal determination, thereby ceding a function of the federal tax law to state-based processes and implicitly acknowledging the possibility that states may change their tort laws.

> [T]he use of the terms "damages" and "personal injury" by Congress necessarily implies that the exclusion under sec. 104(a)(2) depends, to some degree, upon classifications under State law. This is confirmed by use of the term 'tort or tort type rights' in the regulations under sec. 104(a)(2).

Threlkeld, 87 T.C. at 1306 n. 6.

[37] *See, e.g.*, Iowa Code § 910.1 ("pecuniary damages" recoverable by a victim against an offender do not include punitive damages or damages for pain, suffering, mental anguish, or loss of consortium); N.M. Stat. Ann. § 31-17-1 ("actual damages" recoverable by a victim shall not include punitive damages or damages for pain, suffering, mental anguish, or loss of consortium).

1974-1 C.B. 18 (not explicitly referring to Section 104(a)(2)),[38] are left without guidance in assessing whether their reforms will penalize their intended beneficiaries. "Such a trend will only thwart state searches for better solutions in an area where this Court should encourage state experimentation." *Santosky* v. *Kramer*, 455 U.S. 745, 773 (1982) (Rehnquist, J., dissenting).

More generally, petitioner's litigating position, if elevated to a rule of law, would confront victims, employers, and courts with great administrative difficulties. The uncertainty of predicting tax effects under petitioner's result-driven theories would increase the transaction costs and the economic burdens of settlements and send more taxpayers to the courts.[39] Courts adjudicating tax issues would be forced to relitigate settled civil disputes in order to disentangle overlapping claims. Given the position of Rev. Rul. 93-88, 1993-2 C.B. 61, permitting tax-free recoveries of various damages under Title VII of the Civil Rights Act of

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[38] *See, e.g.*, Or. Atty. Gen. Op. (June 30, 1986), *reprinted in* 1986 Ore. AG LEXIS (compensation under Or. Rev. Stat §§ 147.005 - 147.415 to certain crime victims, relatives, and dependents, held excludable from Oregon taxable income in reliance on Rev. Rul. 74-74).

[39] As an example of the chaotic repercussions of petitioner's Portal-to-Portal Act theory even beyond Section 104(a)(2), query whether petitioner's revocation of the *ratio decidendi* of Rev. Rul. 69-581 upsets the reasonable expectations of employers who might otherwise have relied on that ruling in deducting their FLSA settlement payments. Petitioner's departure from Rev. Rul. 69-581, which violates the invitation to rely on rulings extended by Rev. Proc. 89-14, 1989-1 C.B. 814, now injects into every settlement negotiation involving governmental payees or disbursing agents the risk that petitioner may treat FLSA or ADEA liquidated damages as nondeductible fines or penalties. *See* Code § 162(f) (added by Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487, § 902, applicable to all taxable years to which the 1954 Code applies); Treas. Reg. § 1.162-21.

1964, 42 U.S.C. §§ 1981a, 2000e-2000e-17, the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, and Section 16 of the Civil Rights Act of 1870, 42 U.S.C. § 1981, the taxation of ADEA plaintiffs would create an economic incentive for victims of discrimination to forego a remedy provided by Congress and skew their pleadings and settlements toward other laws, frustrating the legislative policy of the ADEA.

III.

ADEA LIQUIDATED DAMAGES ARE NOT INCLUDABLE IN INCOME AS PUNITIVE DAMAGES UNDER SECTION 104(A)(2).

Petitioner's alternative argument contemplates the possibility that this Court may find that a lawsuit under the ADEA is an action involving tort or tort-type rights, so that damages under the ADEA on account of personal injuries are excludable from gross income. Recognizing that such an outcome would lead to the exclusion of Mr. Schleier's lost earnings from his gross income, *see* Rev. Rul. 93-88, 1993-2 C.B. 61, petitioner nevertheless maintains that ADEA liquidated damages should be taxed, on the ground that they were not received "on account of" the injury of discrimination.

1. We have already demonstrated that ADEA liquidated damages serve a partially compensatory role, reflecting their origins in the compensatory liquidated damages of the FLSA, *see Brooklyn Savings Bank*, 324 U.S. 697; *Overnight Motor Transportation Co., Inc.*, 316 U.S. 572; *Powers*, 915 F.2d 34; *Schmitz*, 34 F.3d 790. ADEA liquidated damages are thus distinguishable from those "damages awarded as punishment of a wrongdoer, *rather than* as compensation for an injury," Pet. Br. at 26 (emphasis added), toward which petitioner's alternative argument is directed. By compensating for consequential damages attendant upon the

injury of discrimination, ADEA liquidated damages are necessarily "on account of"[40] personal injury.

Unlike exclusively punitive damages in tort cases, which may be awarded in proportion to a defendant's bad behavior, even though the plaintiff receives nominal compensatory damages, ADEA liquidated damages may not be awarded unless the victim has shown an entitlement to lost earnings or back pay. 29 U.S.C. § 216(b). Congress thus required the injury of discrimination to be proven before the victim may receive ADEA liquidated damages. Moreover, the magnitude of the injury, rather than the degree of culpability on the part of the defendant, determines the amount of ADEA liquidated damages. Thus, in Mr. Schleier's case, two victims of United's age discrimination policy receiving dissimilar amounts of lost earnings would have received proportionally dissimilar amounts of ADEA liquidated damages, even though United's company-wide policy was "equally willful" toward all over-60 employees.

The courts on which petitioner relies for her major premise—that punitive damages without a compensatory function are not excludable from income even if they arise in cases of personal injury—reject her minor premise—that ADEA liquidated damages only punish. *See Miller*, 914 F.2d 586, and *Reese*, 24 F.3d 228. The Fourth Circuit had previously held that liquidated damages under the Equal Pay Act were excludable from income because they had compensatory and punitive functions. *Thompson* v. *Commissioner*, 866 F.2d 709 (4th Cir. 1989). *Miller* reaffirmed that view, "not[ing] further that nothing in our analysis is inconsistent

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[40] "On account of" has traditionally meant "in consideration of, for the sake of, by reason of, because of." I *Oxford English Dictionary* 86 (2d Ed. 1989).

with the case law that has developed around § 104(a)(2)." 914 F.2d at 591. The court was impelled to add:

> Nor is there any inconsistency between on the one hand, our decision to distinguish compensatory relief from punitive relief and, on the other hand, the proposition that courts should not distinguish, for section 104(a)(2) purposes, among the kinds of injurious consequences flowing from a defendant's invasion of a plaintiff's tort type right. *See, e.g., Rickel* v. *Commissioner*, 900 F.2d 655, 657-664 (3d Cir. 1990) ([ADEA] damages for economic harm flowing from a tortious injury as equally excludable as damages for physical harm).

914 F.2d at 591 n. 8. Like this Court, which took note of *Rickel* in *Burke*, *see* 112 S.Ct. at 1871 n. 6, the Fourth Circuit should be presumed to have understood the authority it was citing.

Reese cited *Miller* with sympathy and relied on a similar distinction between solely punitive damages and damages that have a compensatory function. In *Reese* the taxpayer had tried to blur the difference between her purely punitive damages and other taxpayers' ADEA liquidated damages in order to argue for extending the favorable decisions in *Pistillo* and *Redfield* to her facts. 24 F.3d at 234. Specifically commenting on the prior decisions of courts of appeals holding that ADEA damages are excludable under Section 104(a)(2), the Court of Appeals for the Federal Circuit stated:

> To the extent [*Redfield* and *Pistillo*] dealt with the excludability of damages received, they dealt only with compensatory damages, not punitive damages. *See Redfield*, 940 F.2d at 544; *Pistillo*, 912 F.2d at 147.

Id. The *Reese* court's rejection of the taxpayer's contention in that case applies equally to the position advanced by petitioner as her alternative argument before this Court.

Furthermore, the court would not have cited and distinguished *Pistillo* and *Redfield* if it agreed with the view of petitioner in the case at bar that *Burke* implicitly overruled all prior decisions on the tax treatment of age discrimination.[41]

2. By attempting to style ADEA liquidated damages as exclusively punitive, petitioner is inviting the Court to resolve a question beyond the scope of Mr. Schleier's case, concerning which courts are in disagreement. *Compare Hawkins* v. *United States*, 30 F.3d 1077; *Reese*, 24 F.3d 228, and *Miller*, 914 F.2d 586, *with Horton* v. *Commissioner*, 33 F.3d 625 (6th Cir. 1994).

The excludability of purely punitive tort damages rests on the plain language of Section 104(a)(2): "*any* damages received . . . on account of personal injuries" (emphasis added). At one time the Internal Revenue Service itself favored the view that punitive damages in tort cases are excludable from income under Section 104(a)(2), observing that "[t]here is nothing in the legislative history of Code § 104 or the regulations thereunder indicating that punitive damages awarded in connection with personal injuries should be includible in gross income," and concluding "the compensatory vs. punitive distinction is not relevant to damages within Code § 104(a)(2)."[42] The agency also believed that the holding of Rev. Rul. 58-578, 1958-2 C.B. 38, was broad enough to encompass the finding that damages under *any* wrongful death statute, whether punitive or compensatory, were excludable from income.[43]

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[41] *Schleier*, 5th Cir. No. 93-5555, Brief for the Appellant at 13-14.

[42] G.C.M. 35967 (August 27, 1974), 1974 IRS GCM LEXIS 140, at *4 n.1, *7; *cf. Rowan Companies*, 452 U.S. at 261 n. 17.

[43] G.C.M. 35967, 1974 IRS GCM LEXIS at *12. Illustrating the agency's continuing ambivalence, G.C.M. 37398 (January 31,

(continued...)

The Tax Court holds punitive tort damages excludable:

> The beginning and end of the inquiry should be whether the damages were paid on account of "personal injuries." This inquiry is answered by determining the nature of the underlying claim. Once the nature of the underlying claim is established as one for personal injury, any damages received on account of that claim, including punitive damages, are excludable.

Horton v. *Commissioner*, 100 T.C. 93, 96 (1993), *aff'd*, 33 F.3d 625 (6th Cir. 1994). In affirming this decision, the Court of Appeals for the Sixth Circuit adopted the Tax Court's understanding, supported by *Burke*, that punitive damages are " 'inextricably bound up' with the concept of tort type rights, . . . and therefore one of the prime determinants of whether a claim is for personal injury." 33 F.3d at 630;[44] *see also Hawkins*, 30 F.3d at 1085-86 (Trott, J., dissenting):

> The [*Burke*] Court described the availability of punitive damages as one of the indicia of traditional tort liability. *Id.* The Court then relied upon the unavailability of punitive damages in a Title VII case to hold that Title VII does not redress a tort-like personal injury. *Id.* at 1873. The Supreme Court stated that "the concept of a 'tort' is inextricably bound up with remedies," including punitive damages. *Id.* at 1872 n.7.

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[43] (...continued)
1978), 1978 IRS GCM LEXIS 429, conceded that the exclusion of punitive wrongful death payments was "based on a plausible interpretation of the statutory language," *Id.* at *12. It observed that the word "any" was "broad enough to cover punitive as well as compensatory damages," and noted that the tax-free treatment had the "desirable effect of creating uniformity in the treatment of damages received under the wrongful death statutes of the various states." *Id.* Nonetheless, the agency concluded taxation was more appropriate.

[44] The Sixth Circuit also noted that the punitive damages in Kentucky had a compensatory aspect. 33 F.3d at 631.

This Court's observation in *Burke* that in 1989 "Congress amended § 104(a) to allow the exclusion of *punitive* damages only in cases involving 'physical injury or physical sickness,' " 112 S.Ct. at 1871 n. 6 (emphasis in original), lends further support to the exclusion from income of purely punitive tort damages in taxable years before the effective date of the 1989 amendment. In cases of punitive damages involving physical injuries or physical sickness, the 1989 legislation preserved the pre-existing tax treatment of general punitive tort damages.

Congress should be presumed not to have acted irrationally when it subdivided the pre-1989 tax concept of "punitive damages" under Section 104(a)(2), differentiating between (i) punitive damages arising in a case not involving physical injuries or physical sickness and (ii) punitive damages arising in a case involving such injuries or sickness, and making no change in the law applicable to the latter. It would have made no sense for Congress to change the tax treatment of punitive damages in non-physical injury cases while leaving unsettled the tax treatment of punitive damages in physical injury cases. "Quite obviously, reenacting precisely the same language would be a strange way to make a change." *Pierce* v. *Underwood*, 487 U.S. 552, 567 (1988). Just as "[t]he enactment of this limited amendment addressing only punitive damages shows that Congress assumed that other damages (*i.e.*, compensatory) would be excluded in cases of both physical *and* nonphysical injury," 112 S.Ct. at 1871 n. 6 (emphasis in original), so the undisturbed, tax-free treatment of punitive damages in cases involving physical injuries or sickness indicates that the pre-amendment treatment of all punitive tort damages was the same.

Finally, the holdings in *Miller*, *Reese*, and *Hawkins* supporting the taxation of purely punitive tort damages must be regarded with skepticism, because they all relied on the

return of capital metaphor in order to justify the denial of the Section 104(a)(2) exclusion to exclusively punitive tort damages. *See Miller*, 914 F.2d at 590; *Reese*, 24 F.3d at 233 ("punitive damages in no way resemble a *return* of capital") (emphasis in original); *Hawkins*, 30 F.3d at 1084 ("[i]n [these] circumstances, the restoration of capital rationale underlying § 104(a) is simply inapplicable"). We have already shown how that rationale fails generally.[45]

CONCLUSION

The decision of the Fifth Circuit Court in Appeals, as amplified by that of the Ninth Circuit Court of Appeals in *Schmitz* v. *Commissioner*, 34 F.3d 790, should be affirmed.

Respectfully submitted,

THOMAS F. JOYCE
Counsel of Record
ALAN M. SERWER
BELL, BOYD & LLOYD
70 West Madison Street
Suite 3200
Chicago, Illinois 60602
(312) 372-1121

RAYMOND C. FAY
BELL, BOYD & LLOYD
1615 L Street, N.W.
Washington, D.C. 20036
(202) 466-6300

Attorneys for Respondents

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[45] *See* pp. 21-24, *supra*.

No. 94-500

In the Supreme Court of the United States

OCTOBER TERM, 1994

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ERICH E. AND HELEN B. SCHLEIER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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A. Back pay and liquidated damages awarded under the ADEA do not represent damages received on account of personal injuries

1. The question presented in this case is whether back pay and liquidated damages received in litigation under the Age Discrimination in Employment Act (ADEA) are excludable from gross income under Section 104(a)(2) of the Internal Revenue Code. Section 104(a)(2) provides an exclusion from gross income for "any damages received * * * on account of personal injuries or sickness." The accompanying Treasury regulation states that the term "damages received" means "an amount received * * * through prosecution of a legal suit or action based upon tort or tort type rights, or

through a settlement agreement entered into in lieu of such prosecution." 26 C.F.R. 1.104-1(c). Under the statute, as amplified by the regulation, a recovery may be excluded from gross income only when it both (i) was received through prosecution or settlement of an "action based upon tort or tort type rights" (*ibid.*) and (ii) was received "on account of personal injuries or sickness" (26 U.S.C. 104(a)(2)). As an exclusion from gross income, Section 104(a)(2) "is to be construed narrowly" (*United States* v. *Centennial Savings Bank*, 499 U.S. 573, 583 (1991)).[1] See also *United States* v. *Burke*, 112 S. Ct. 1867, 1876 (1992) (Scalia, J., concurring); *id.* at 1878 (Souter, J., concurring).

In *Burke*, the Court concluded that a remedial structure that compensates for economic loss but does not compensate for personal components of injury such as pain and suffering does not yield "damages * * * on account of personal injuries" within the meaning of the statute and the regulation. A breach of contract, for example, may well be regarded by the offended party as injuring him "personally." In that loose sense, a breach of contract could be said to inflict "personal injuries."[2]

[1] Respondent's contention that Section 104(a)(2) should be interpreted "compassionately" (Resp. Br. 18-24) is incorrect. As an exclusion from income, Section 104(a)(2) "[i]s to be construed narrowly" (*United States* v. *Centennial Savings Bank*, 499 U.S. at 583). In concluding that back pay received by victims of sex discrimination under the remedial structure of the pre-1991 version of Title VII is not excluded from income under Section 104(a)(2), the Court emphasized in *Burke* that "[t]he fact that employment discrimination causes harm to individuals does not automatically imply * * * that there exists a tort-like 'personal injury' for purposes of federal income tax law." 112 S. Ct. at 1873.

[2] Similarly, a corporation or individual may recover damages under a "tort or tort type" cause of action—such as claims for injuries to property, fraud and trade libel—that would *not* qualify for an exclusion from income under the statute because they involve injuries to property or other economic interests rather than injuries to the person. The regulatory definition of "damages received" (in 26 C.F.R. 1.104-1(c)) cannot be understood in isolation from the further statutory requirement that such damages be received "on account of personal injuries or sickness" (26 U.S.C. 104(a)(2)).

Congress, however, obviously did not employ the term "personal injuries" in that loose manner. Instead, as the Court reasoned in *Burke*, as employed in Section 104(a)(2), the term properly refers to a recovery under a tort-like scheme of relief that compensates the individual for the personal elements of his injury, "such as pain and suffering, emotional distress, [and] harm to reputation." 112 S. Ct. at 1873. The Commissioner, whose interpretation is entitled to "controlling weight" (*Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)), has expressed the same understanding of the regulation.[3] See Rev. Rul. 93-88, 1993-2 C.B. 61.

In the present case, the ADEA makes no provision for compensation for pain and suffering, emotional distress or any other personal element of injury. Under this Court's holding in *Burke*, and under the Commissioner's interpretation of her own regulation, the recovery at issue in this case is therefore not excluded from income under Section 104(a)(2).

[3] "In construing regulations, the Court normally defers to the agency's interpretation." *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 538 n.29 (1982). See also *Ford Motor Credit* v. *Milhollin*, 444 U.S. 555, 565 (1980) (agency interpretation of its own regulation upheld "[u]nless demonstrably irrational"). The Court has noted the particular need for deference to Treasury regulations to ensure that in " 'this area of limitless factual variations' * * * like cases will be treated alike." *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 477 (1979), quoting *United States* v. *Correll*, 389 U.S. 299, 307 (1967).

2. a. It is obvious that, if only backwages were available under the ADEA, this suit would fall within the precise holding of *Burke*. Respondent, of course, contends that this case differs from *Burke* because the ADEA provides not only backwages but also liquidated damages (in an amount equal to the backpay award) for "willful violations" of the ADEA. Even though personal components of loss such as pain and suffering and emotional distress are not compensable (or even admissible) in an ADEA suit, respondent claims that an award of liquidated damages under the ADEA (when available) somehow indirectly effects compensation for these "difficult to prove" personal losses (Resp. Br. 15, 24-31).

In making that contention, respondent persists in relying (Resp. Br. 15, 24-31) on the inapposite decisions of *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 707 (1945), and *Overnight Motor Transportation Co.* v. *Missel*, 316 U.S. 572, 583, 584 (1942), which held that liquidated damages under the different text of the since-amended provisions of the Fair Labor Standards Act of 1938 represented compensation for "damages too obscure and difficult of proof" (Pet. App. 29a). Refusing to come to grips with the obvious differences in the language of the provisions relating to liquidated damages under the pre-1947 version of the FLSA and under the ADEA as enacted in 1967, respondent claims (Resp. Br. 26-27) that the decisions in *Brooklyn Savings* and *Overnight Motor* are applicable here because the ADEA "incorporated" the FLSA remedies.

That contention is well wide of the mark. There are manifest, important differences between the pre-1947 FLSA liquidated damages provisions involved in *Brooklyn Savings* and *Overnight Motor* and the provisions enacted by Congress in the ADEA in 1967. As

we explain in our opening brief (Pet. Br. 20-25), the description in *Brooklyn Savings* and *Overnight Motor* of the compensatory nature of the *mandatory* liquidated damages provision under the pre-1947 version of the FLSA is simply inapplicable to the different provisions of the ADEA, under which liquidated damages are available only for "willful violations" of that Act.[4] The Court noted that very distinction in *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985), in concluding that liquidated damages for "willful violations" of the ADEA are not compensatory but are "punitive in nature." *Id.* at 125.[5] Respondent simply fails to acknowledge that the very decisions on which he relies were distinguished by this Court in *Thurston* in explaining the significant differences between the

[4] Respondent mischaracterizes our discussion of the 1947 amendment to the FLSA, which allowed employers to defend against an award of liquidated damages based on a showing of good faith. Contrary to respondent's contention (Resp. Br. 27), our position that ADEA liquidated damages are punitive rather than compensatory is not based on the 1947 amendment to the FLSA. In fact, we explicitly stated that "[w]hen the ADEA was enacted in 1967, and 'modeled in part' on the then-existing provisions of the FLSA, * * * *the availability of liquidated damages was further expressly limited to those situations where the employer had 'willfully' violated the ADEA*" (Pet. Br. 22-23 (emphasis added)). We further noted that it was in *this* context that the Court correctly concluded in *Trans World Airlines, Inc.* v. *Thurston*, that ADEA liquidated damages are "punitive in nature" (Pet. Br. 23).

[5] See also *Reichman* v. *Bonsignore, Brignati & Mazzota P.C.*, 818 F.2d 278, 282 (2d Cir. 1987) (holding that an ADEA litigant may recover both liquidated damages and prejudgment interest on the back pay award because *Thurston* held "that liquidated damages under the ADEA are punitive in nature"); *Lindsey* v. *American Cast Iron Pipe Co.*, 810 F.2d 1094, 1102 & n.7 (11th Cir. 1987) (same).

remedial scheme of the ADEA and that of the pre-1947 version of the FLSA. See *id.* at 128 n.22.

In *Thurston*, the Court explained that the 1967 legislative history of the ADEA, as well as the text of that Act, revealed that "Congress intended for liquidated damages to be punitive in nature." 469 U.S. at 125. In particular, the liquidated damages remedy for "willful violations" of the ADEA was adopted as a substitute for the *criminal* provisions of the FLSA (29 U.S.C. 216(a)) that provide penalties for "willful violations" of that statute. 469 U.S. at 125-126.[6] As the Court explained in *Thurston* (*id.* at 125):

> The legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature. The original bill proposed by the administration incorporated §16(a) of the FLSA, which imposes criminal liability for a willful violation. * * * Senator Javits found "certain serious defects" in the administration bill. He stated that "difficult problems of proof . . . would arise under a criminal provision," and that the employer's invocation of the Fifth Amendment might impede investigation, conciliation, and enforcement. * * * Therefore, he proposed that "the [FLSA's] criminal penalty in cases of willful violation . . . [be] eliminated and a double damage liability substituted." * * * Senator Javits argued that his proposed amendment would "furnish an effective deterrent to willful violations [of the ADEA] * * *."

[6] See also *Smith* v. *Department of Human Services*, 876 F.2d 832, 836 (10th Cir. 1989); *Maleszewski* v. *United States*, 827 F. Supp. 1553, 1556 (N.D. Fla. 1993) ("The ADEA included the liquidated damages provision in lieu of the criminal penalty for willful violations of the Fair Labor Standards Act.").

Liquidated damages under the ADEA are not compensatory in form or function. They serve as a substitute for criminal penalties and were enacted to provide punishment and deterrence for "willful violations" of that Act.[7] *Ibid.*

Respondent contends that it is an "oversimplistic dichotomy" (Resp. Br. 30) to separate compensatory from punitive damages. But this Court has long recognized that "punitive damages * * * are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Similarly, in *Molzof* v. *United States*, 112 S. Ct. 711 (1992), the Court noted that "the common law recognizes that damages intended to compensate the plaintiff are different in kind from 'punitive damages'" and that "[t]he term 'punitive damages' * * * embodies an element of the defendant's

[7] Respondent errs in relying (Resp. Br. 16 n.14) on the legislative history of the 1978 amendment to the jury trial provisions of the ADEA. A committee report issued in connection with that amendment referred to the *Overnight Motor* decision as evidencing a "compensatory" nature for liquidated damages (Resp. Br. 16 n.14). When this Court reviewed the history of the 1978 amendment in *Thurston* (see 469 U.S. at 123-124), the Court gave no weight to the committee report's erroneous referrences to *Overnight Motor*. Instead, in determining that ADEA liquidated damages are punitive in nature, rather than compensatory, the Court distinguished the *Brooklyn Savings* and *Overnight Motor* decisions to which the 1978 legislative history referred. See *id.* at 128 n.22. As evidenced by this Court's decision in *Thurston*, respondent's invocation of the 1978 committee report provides a perfect illustration of the fact that subsequent legislative history provides a "hazardous basis" for inferrring the intent of the Congress that enacted the earlier legislation (*United States* v. *Texas*, 113 S. Ct. 1631, 1635 & n.4 (1993)).

conduct that must be proved before such damages are awarded." *Id.* at 716.

If Congress had intended to compensate age discrimination plaintiffs for personal injuries such as pain and suffering and emotional distress, it would not have done so through an award of "liquidated damages" that is predicated on willful misconduct and measured solely by the employee's lost wages. Instead, Congress would have explicitly provided compensatory damages for intangible elements of personal injury as it did, for example, in the Civil Rights Act of 1991, Pub. L. No. 102-166, § 1977(b)(3), 105 Stat. 1073.

b. Even if liquidated damages under the ADEA were thought to be in some fashion "compensatory"—rather than "punitive in nature" (469 U.S. at 125)—that does not mean that such damages compensate for "personal injuries." For example, damages for breach of contract or for trespass of chattels are "compensatory" but they do not compensate for "personal injuries" and are thus not within the exclusion from income of Section 104(a)(2). Whether liquidated damages under the ADEA are thought of as "compensation" or as "punishment," they plainly do not represent compensation for the inadmissible personal components of the plaintiff's injury—such as pain and suffering—and therefore are not excludable under Section 104(a)(2). An award of ADEA liquidated damages is simply a "double damages" penalty designed to punish and deter willful violations of the Act.

Under the analysis applied by the Internal Revenue Service in interpreting the regulation, recoveries of backwages and liquidated damages under the ADEA do

not come within the statutory exclusion.[8] See Rev. Rul. 93-88, 1993-2 C.B. 61. Because the agency's interpretation does not conflict with the plain language of the statute or the regulation, it is entitled to "controlling weight" (*Thomas Jefferson University* v. *Shalala*, 114 S. Ct. 2381, 2386 (1994)).[9] Cf. *United States* v. *Burke*, 112

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[8] Respondent struggles to find an inconsistency in the Service's position by citing (Resp. Br. 25-26) Rev. Rul. 69-581, 1969-2 C.B. 26, which permits *employers* a deduction (as a business expense) for payments of backwages and liquidated damages under *the FLSA*. The question addressed in that Ruling was whether backwages and liquidated damages paid by employers represented non-deductible fines and penalties. Relying on the pre-1946 decisions of this Court in *Overnight Motor* and *Brooklyn Savings*, the Service concluded that FLSA liquidated damages were deductible by employers as "compensation for delay" in payments of backwages. *Ibid.* As the Court concluded in *Thurston*, however, the pre-1946 FLSA cases are inapplicable to the different language of the ADEA. 469 U.S. at 128 n.22. The present case, of course, involves the ADEA, not the FLSA. Moreover, notwithstanding respondent's incorrect contention that tne Commissioner's position under the FLSA is "newly adopted for this Court" (Resp. Br. 25), the Service has long ruled that FLSA recoveries of backpay and liquidated damages are not excluded from income under Section 104(a)(2). See Rev. Rul. 72-268, 1972-1 C.B. 313 ("such amounts are income to the employees and must be included in their Federal income tax returns").

Respondent also quotes a portion of one sentence of our opening brief out of context as a basis for alleging (Resp. Br. 31) that the government has not maintained a consistent view on ADEA liquidated damages. It is clear, however, that the government has consistently maintained that recoveries of damages under remedial schemes like that of the ADEA are not excluded from income under Section 104(a)(2). See, *e.g.*, Pet. Br. 25-35; Rev. Rul. 93-88, *supra*; Rev. Rul. 72-268, *supra*.

[9] See, *e.g.*, *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 151 (1956) (noting that liquidated damages are a well-known remedy for breach of contract); *Kolb* v. *Goldring, Inc.*, 694 F.2d 869, 871-872 (1st Cir. 1982) (noting that the ADEA provides a remedy

S. Ct. at 1874 n.13 (noting that the Court's decision conformed to Rev. Rul. 72-341, 1972-2 C.B. 32).

3. a. A defining characteristic of dignitary tort actions under the common law is that damages for intangible elements of personal injury are awarded without regard to whether the victim suffered economic loss (D. Dobbs, *Law of Remedies* 623 (2d ed. 1993)):[10]

> [D]ignitary harms may cause economic harm as well as affront to personality. If so, economic damages may be recovered. However, in a great many of the cases, the only harm is the affront to the plaintiff's dignity * * *, the damage to his self-image, and the resulting mental distress. It does not follow that recovery is limited to nominal damages, however, even if the extent of emotional distress is not proved. On the contrary, the traditional rule for "trespassory" cases like assaults and batteries, was that "general damages" or "presumed damages" of a substantial amount can be recovered merely upon showing that the tort was committed at all.

By contrast, *all* damages awarded under the ADEA are contingent upon proof of economic loss. It is thus incorrect to suggest that the limited statutory remedies of the ADEA represent a dignitary "tort" within the meaning of the regulation. The Commissioner's contrary interpretation of her own regulation should, in any event, be dispositive on this point. See note 3, *supra*.

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similar to a suit "for back wages for breach of contract," that "[p]ain and suffering form no part of the damages" and that common law "[p]unitive damages are not allowed").

[10] The Court cited this treatise with approval in *United States* v. *Burke*, 112 S. Ct. at 1871-1872.

Respondent's further contention (Resp. Br. 17) that ADEA liquidated damages are similar to common law "presumed damages" is flawed in several respects. Presumed damages under the common law were not contingent upon "willful" misconduct by the defendant. Instead, when available, "the traditional rule * * * was that 'general damages' or 'presumed damages' of a substantial amount can be recovered merely upon showing that the tort was committed at all." D. Dobbs, *supra*, at 623. Second, presumed damages at common law were awarded irrespective of economic loss. See *Carey* v. *Piphus*, 435 U.S. 247, 262 (1978) ("the doctrine of presumed damages in the common law of defamation *per se* 'is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss' ") (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 349). By contrast, liquidated damages under the ADEA are available *only* for "willful violations" of the Act and, when available, are measured *solely* by the amount of the backwages award. ADEA liquidated damages thus have neither of the distinguishing characteristics of "presumed damages."

b. Respondent errs in suggesting that the availability of a jury trial under the ADEA evidences a "tort type" remedial scheme (Resp. Br. 12-14). As explained in our opening brief (Pet. Br. 21 n.11), while the lack of a right to a jury trial may indicate a particular remedy is not "tort type" in nature, the availability of a jury trial cannot establish that the right is "tort type." Jury trials are as available in contract cases as they are in tort cases. Moreover, if the Court had considered the availability of a jury trial to be dispositive of the issue before it in *Burke*, the Court could simply have resolved the open question whether jury trials were available under the pre-1991 version of Title VII (see *Lytle* v.

Household Manufacturing, Inc., 494 U.S. 545, 549 n.1 (1990)) and based its decision on that result. Respondent, in any event, ultimately acknowledges (Resp. Br. 12-13) that the availability of a jury trial is not determinative for Section 104(a)(2) purposes.

4. a. Respondent states (Resp. Br. 11) that "*Burke* cited with approval" the Third Circuit's decision in *Rickel* v. *Commissioner*, 900 F.2d 655 (1990), which held that back pay awards under the ADEA are excludable under Section 104(a)(2). The Court cited *Rickel*, however, for the limited proposition that the Service and the courts had long recognized that the term "personal injuries" in Section 104(a)(2) encompasses nonphysical injuries. See 112 S. Ct. at 1871 n.6; Pet. Br. 12-13 n.3. The Court did so in response to Justice Scalia's concurring opinion, which concluded that Section 104(a)(2) applies only to damages to an individual's physical or mental health and does not encompass dignitary torts. See 112 S. Ct. at 1874-1876. Respondent is incorrect in implying that the Court endorsed *Rickel* for the further proposition that ADEA recoveries are excludable under Section 104(a)(2).

Far from agreeing with *Rickel* on the ultimate merits, the analysis applied by the Court in *Burke* repudiated the reasoning of that decision. In *Rickel*, the Third Circuit concluded that back pay received under federal antidiscrimination statutes is excludable from gross income under Section 104(a)(2) because those statutes redress "personal injuries." The court of appeals reasoned that the ADEA represents a tort-type remedial scheme because (i) an ADEA suit alleges a violation of a duty that arises by operation of a statute and not by virtue of a contract and (ii) statutes addressing discrimination in the workplace had been characterized by other courts as involving personal injury. 900 F.2d at

662-663. That is the same analytical approach that the Sixth Circuit applied in *Burke*, 929 F.2d 1119, 1122-1123 (1991), which this Court rejected in holding that back pay received under the pre-1991 version of Title VII is *not* excludable from income under Section 104(a)(2). See *Downey* v. *Commissioner*, 33 F.3d 836, 838 (7th Cir. 1994), petition for cert. pending, No. 94-999; *Schmitz* v. *Commissioner*, 34 F.3d 790, 792 (9th Cir. 1994).[11]

b. Respondent's discussion of the history of Section 104(a)(2) (Resp. Br. 20-21 n.18) mischaracterizes our opening brief and misdescribes that history. Contrary to respondent's assertion, our opening brief did not suggest that, between 1920 and 1972, the Service took the position that damages for intangible injuries were subject to tax. Instead, we correctly stated (Pet. Br. 12 n.3) that, during that period, the Service interpreted Section 104(a)(2) as encompassing only damages recovered in connection with physical injuries. See Sol. Mem. 1384, 2 C.B. 71 (1920). Contrary to respondent's assertion, Sol. Op. 132, I-1 C.B. 92, 93 (1922), did not reject that interpretation of the statute. Instead, that opinion explicitly stated that "Solicitor's Memorandum 1384 correctly held that the exemption contained in section 213(b)(6) of the Revenue Act of 1918 does *not* include damages for alienation of affections" (emphasis added). That opinion based its conclusion that such recoveries were not subject to tax on the different theory that they represented a "return

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[11] Two other pre-*Burke* decisions also adopted the reasoning of *Rickel* in concluding that ADEA recoveries were excluded from income under Section 104(a)(2). See *Pistillo* v. *Commissioner*, 912 F.2d 145 (6th Cir. 1990); *Redfield* v. *Insurance Company of North America*, 940 F.2d 542 (9th Cir. 1990). Respondent errs in suggesting (Resp. Br. 10) that the analysis of those decisions remains relevant after their reasoning was repudiated by this Court in *Burke*.

of capital" that did not constitute "income" under this Court's decision in *Eisner* v. *Macomber*, 252 U.S. 189 (1920).

Prior to 1972, the Service's conclusion that damages for intangible injuries were not taxable was thus predicated on a narrow view of income, not on the language of Section 104(a)(2). That same rationale was adopted by the Board of Tax Appeals in *Hawkins* v. *Commissioner*, 6 B.T.A. 1023 (1927), acq., 7-1 C.B. 14 (1928), where the court held that libel damages did not constitute income. Although this Court in *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955), subsequently rejected the narrow definition of "income" reflected in these authorities, the Service's rulings (Rev. Rul. 58-418, 1958-2 C.B. 18, 19) continued to reflect the older view that compensatory damages received in a libel action did not constitute "income" within the meaning of Section 61 of the Internal Revenue Code. It was not until 1972, when the Service acquiesced in *Seay* v. *Commissioner*, 58 T.C. 32 (1972), acq., 1972-2 C.B. 3, that the Service accepted the rationale that damages for nonphysical injuries represent "income" that is excluded from tax under Section 104(a)(2). See also Pet. Br. 30-32; Kahn, *Compensatory and Punitive Damages for a Personal Injury: To Tax or Not to Tax?*, 2 Fla. Tax Rev. 327, 330-332 (1995).

With respect to both physical and non-physical injuries, only damages awarded under a remedial scheme that compensates for the personal components of loss—such as pain and suffering—qualify as damages "on account of personal injury" under Section 104(a)(2). See Rev. Rul. 93-88, *supra*.

B. Liquidated damages under the ADEA are not excluded from income under Section 104(a)(2) for the additional reason that they are awarded "on account of" the defendant's willful misconduct rather than "on account of" the taxpayer's personal injuries

In our opening brief (Pet. Br. 25-35), we explain that ADEA liquidated damages are not excludable from income for the additional independent reason that such damages are awarded "on account of" the employer's willful misconduct and not "on account of" the employee's personal injuries. The text, structure, title and legislative history of the statute indicate that Section 104(a)(2) excludes only "compensation" for loss and does not exclude punitive damages and statutory penalties imposed for willful violations of law. We have noted (Pet. Br. 28) that this conclusion draws support from the fundamental principle that exclusions from income are to be strictly construed.

1. a. Respondent asserts (Resp. Br. 36-39) that the question whether penalties and punitive damages awarded on account of malice or willfulness are within the scope of Section 104(a)(2) is not presented in this case because, in respondent's view, ADEA liquidated damages are compensatory as well as punitive. That contention is wrong for the reasons discussed at pages 4-10, *supra*.[12] Liquidated damages under the ADEA are

[12] Respondent errs in contending (Resp. Br. 37-38) that *Commissioner* v. *Miller*, 914 F.2d 586 (4th Cir. 1990), endorsed the view that ADEA liquidated damages are partly compensatory. That case did not even involve the ADEA. Moreover, the comments of the *Miller* court about liquidated damages under the pre-1947 FLSA decisions are inapposite for the reasons we have noted. See Pet. Br. 26 n.17.

identical in character to other types of punitive damages and statutory penalties—such as trebled damages under the antitrust laws—that are unquestionably subject to tax. See *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955). Indeed, as this Court has noted, ADEA liquidated damages are specifically described in the statute's legislative history as a "double damage" remedy for "willful violations" of the Act. *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. at 125; see page 7, *supra*.

b. Respondent correctly notes (Resp. Br. 39) that the Service has, over time, expressed differing views concerning the excludability of punitive damages under Section 104(a)(2). See Rev. Rul. 85-98, 1985-2 C.B. 51; Rev. Rul. 84-108, 1984-2 C.B. 32; Rev. Rul. 75-45, 1975-1 C.B. 47. As we state in our opening brief, however, during the period prior to 1975 and consistently since 1984 the Service has concluded that punitive damages do not represent an award "on account of personal injuries" within the scope of the statute. See Pet. Br. 27 n.18. It is well settled that "the Commissioner may change an earlier interpretation of the law" (*Dickman* v. *Commissioner*, 465 U.S. 330, 343 (1984)) and thereby "correct mistakes of law in the application of the tax laws to particular transactions" (*Dixon* v. *United States*, 381 U.S. 68, 72 (1965)). Courts are to look to the current, formal view of the Commissioner in deter-

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Respondent similarly errs in describing (Resp. Br. 38) the holding of *Reese* v. *United States*, 24 F.3d 228 (Fed. Cir. 1994). In *Reese*, the court noted that *Pistillo* v. *Commissioner*, *supra*, and *Redfield* v. *Insurance Company of North America*, *supra*, differed from *Reese* because those decisions involved only backpay. 24 F.3d at 234. The suggestion that backpay is "compensatory" is plainly not an endorsement of the proposition that liquidated damages for "willful violations" of the Act are "compensatory." See *ibid.*

mining the meaning of the agency's regulations. See *Commissioner* v. *Miller*, 914 F.2d 586, 591 (4th Cir. 1990); Morrison, *Getting a Rule Right and Writing a Wrong Rule: The IRS Demands a Return on All Punitive Damages*, 17 Conn. L. Rev. 39 (1984). "[A] revised interpretation deserves deference" if it reflects a "reasoned analysis" of the regulation. See *Rust* v. *Sullivan*, 500 U.S. 173, 186-187 (1991), citing, *e.g.*, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 862 (1984).

The Commissioner's view of the statute and regulation reflects a "reasoned analysis." See Pet. Br. 25-35. Respondent errs in asserting (Resp. Br. 39) that the "plain language of Section 104(a)(2)" requires a different conclusion. Respondent claims that punitive and liquidated damages are within the scope of the statutory phrase "any damages" and are therefore excluded from income. The flaw in respondent's position is manifest; it seeks to isolate the term "any damages" from the subsequent term "on account of personal injuries." This Court has emphasized, however, that it does not "construe statutory phrases in isolation; we read statutes as a whole." *United States* v. *Morton*, 467 U.S. 822, 828 (1984).

As the court of appeals explained in *Reese* v. *United States*, 24 F.3d 228, 230 (Fed. Cir. 1994), "the language 'on account of' is not free of ambiguity; rather, it is susceptible of at least two conflicting interpretations." As we show in our opening brief (Pet. Br. 28-32), the structure, title and history of Section 104(a)(2) reflect that the statute is designed to permit tax-free recovery of "compensation" for injuries, not to permit tax-free recoveries of windfall, punitive damage awards.

Moreover, the dictionary definition of the term "on account of," on which respondent seeks to rely (Resp. Br.

37), is consistent with, and indeed supports, the Commissioner's interpretation. The definition of that phrase to mean "because of; for the sake of" (*ibid.*) comports with the Commissioner's view, for damages that are awarded to punish and deter willful misconduct are naturally referred to as received "because of" purposeful misconduct and "for the sake of" punishment and deterrence and not as the result of the personal injuries themselves. See *Reese* v. *United States*, 28 Fed. Cl. 702, 705 (1993), aff'd, 24 F.3d 228 (Fed. Cir. 1994).[13]

2. Respondent erroneously contends (Resp. Br. 40) that the decision in favor of the government in *Burke* supports the exclusion of punitive damages under Section 104(a)(2). As the Federal Circuit correctly noted in *Reese* v. *United States*, 24 F.3d 228, 234 (1994), Burke "did not present facts requiring the Court to determine whether punitive damages awarded in a personal injury action are received 'on account of' personal injury so as to be excludable from gross income by virtue of section 104(a)(2)." Accord, *Hawkins* v. *United States*, 30 F.3d 1077, 1081 (9th Cir. 1994), petition for cert. pending, No. 94-1041. The Court in *Burke* did not mention, let alone

[13] Respondent's critique (Resp. Br. 21-24) of the "return of capital" analysis is misconceived. The "return of capital" phrase accurately describes the fact that the 1919 Congress intended the original version of the statute to apply only to damages that compensate for personal injuries. See Pet. Br. 30-32. This point is confirmed by the structure of the original statute (Section 213(b)(6) of the Revenue Act of 1918, ch. 18, 40 Stat. 1066), which provided that gross income did not include:

> Amounts received through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness.

disapprove of, the Service's position in Rev. Rul. 84-108 that punitive damages are not excludable under the original version of Section 104(a)(2).[14]

Respondent's further suggestion (Resp. Br. 17) that the 1989 amendment to Section 104(a)(2) "changed" the law with respect to the excludability of punitive damages is also wrong. This Court long ago rejected the argument that an amendment to the tax laws provides evidence that the law was formerly otherwise. *Higgins* v. *Smith*, 308 U.S. 473, 479-480 (1940). That principle applies with particular force in this case, for neither the text of the 1989 amendment nor its history contains any suggestion that Congress (either in 1989 or in 1919) believed punitive damages were properly excluded from income under the original statute. Despite respondent's assertion (Resp. Br. 41) that it "would have made no sense" for Congress to leave unsettled the tax treatment of punitive damages received in physical injury cases, the legislative history establishes that that is exactly what Congress did. As noted in our opening brief (Pet. Br. 33 n.22), the Conference Committee redacted language from another version of the bill that had affirmatively provided for the exclusion of punitive damages received in physical injury cases and substituted the "double negative" phraseology contained in the 1989 amendment. See Kahn, *supra*, 2 Fla. Tax. Rev. at 366-371.[15] The 1989 amendment precludes application

[14] "The Court's reference to punitive damages [in *Burke*] was merely part of a broad definition of tort liability rather than a holding that punitive damages were 'compensation for injuries or sickness,' excludable from income under section 104(a)(2)." *Reese* v. *United States*, 24 F.3d at 234. Accord, *Hawkins* v. *United States*, 30 F.3d at 1081.

[15] The redacted language provided that the Section 104(a)(2) exclusion "shall not apply to any punitive damages *unless such*

of the Section 104(a)(2) exclusion to punitive damages recovered in nonphysical injury cases but is silent as to the taxation of punitive damages received in physical injury cases.

Respondent acknowledges that the statement in *Burke* suggesting that the 1989 amendment "allow[s]" the exclusion of punitive damages in post-amendment physical injury cases is "dictum" (Resp. Br. 5). Moreover, that statement is inconsistent with the history of the 1989 amendment and contravenes the fundamental principle of statutory construction that "[e]xemptions from taxation do not rest upon implication," *United States Trust Co.* v. *Helvering*, 307 U.S. 57, 60 (1939). As Professor Kahn observes:

> Congress did not inadvertently omit to make an explicit statement that punitive damages connected with a physical injury are excluded. To the contrary, the draft containing that statement was altered to avoid taking a position on that issue. It is clear then that the 1989 amendment has no bearing on the excludability of punitive damages in cases involving physical injury.

Kahn, *supra*, 2 Fla. Tax. Rev. at 370.

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damages are in connection with a case involving physical injury or physical sickness" (emphasis added). See Kahn, *supra*, 2 Fla. Tax Rev. at 370.

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For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MARCH 1995

No. 94-900

IN THE

Supreme Court Of The United States

October Term, 1994

COMMISSIONER OF INTERNAL REVENUE,
Petitioner

v.

ERICH E. AND HELEN B. SCHLEIER,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE MIGRANT LEGAL ACTION PROGRAM, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

COLLETTE C. GOODMAN
(Counsel of Record)
JULIE M. EDMOND
ROBERT B. WASSERMAN
Shea & Gardner
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000
Counsel for *Amicus Curiae*

February 6, 1995

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INTEREST OF *AMICUS CURIAE*[*]

The Migrant Legal Action Program, Inc. ("MLAP") is a national legal services support center that represents migrant and seasonal agricultural workers throughout the nation. MLAP provides assistance to farmworkers, directly and indirectly, in a wide variety of legal matters, including suits arising under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* ("FLSA").

FLSA plaintiffs in general are among the most "unprotected, unorganized and lowest paid of the nation's working population." *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 707 n.18 (1945). Migrant farmworkers, in particular, "remain today, as in the past, the most abused of all workers in the United States."[1] In addition to being frequent victims of unlawful labor practices, they typically live in substandard housing, have little or no access to medical care, and suffer from malnutrition and high rates of occupationally related illness and injury. Given their extreme poverty, they are likely to suffer grave harm and emotional distress when deprived of minimum wages due them. They thus are keenly in need of the full benefit of any recovery from FLSA suits. Like other victims of tort and tort-like injuries, their benefits would be reduced if they were subject to federal social security and income taxes.

The remedial provisions of the statute at issue in this case -- the Age Discrimination in Employment Act of 1967,

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[*] The parties' written consents to the filing of this brief are being filed today with the Clerk of the Court.

[1] H.R. Rep. No. 885, 97th Cong., 2d Sess. 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4548. The median family income for seasonal agricultural workers is between $7,500 and $10,000 annually. Office of Program Economics, U.S. Dep't of Labor, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY 1990 54 (1991).

29 U.S.C. § 621 *et seq.* ("ADEA") -- incorporate the remedial provisions of the FLSA. *See Lorillard* v. *Pons*, 434 U.S. 575 (1978). The decision in this case is, therefore, likely to affect the tax treatment of damages awarded under the FLSA. While the total amount of money at stake for migrant farmworkers may not be large in absolute terms, an adverse ruling would have a very real impact on the health and welfare of the poorest of this nation's laborers and their families. MLAP and its farmworker clients consequently have a strong interest in the outcome of this case.

SUMMARY OF ARGUMENT

The issue in this case is whether damages received for a willful violation of the ADEA are excludable from income under § 104(a)(2) of the Internal Revenue Code. The remedial provisions of the ADEA are based, in large part, on those of the FLSA. *See Lorillard*, 434 U.S. at 580-83.

Section 104(a)(2) of the Code provides in relevant part that a taxpayer's gross income does not include "the amount of any damages received . . . on account of personal injuries or sickness." The regulations promulgated by the Commissioner, Treas. Reg. § 1.104-1(c), define the term "damages received" to include amounts received through prosecution or settlement of "a legal suit or action based upon tort or tort type rights." This Court held in *United States* v. *Burke*, 112 S. Ct. 1867 (1992), that § 104(a)(2) applies to a recovery when the remedies available under the "relevant cause of action" recompense the plaintiff for pecuniary losses and for "intangible elements of injury" which are "not pecuniary in their immediate consequence." *Id.* at 1871-73.

The FLSA provides for liquidated damages as well as back wages. Liquidated damages compensate for obscure

and difficult to prove injuries to health and well-being suffered by a worker who does not receive statutory minimum wages on time. *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945). These damages meet the *Burke* standard of compensating for "intangible elements of injury" which are "not pecuniary in their immediate consequence."

The Commissioner erroneously contends that the holding of *Brooklyn Savings Bank* was vitiated by § 11 of the Portal-to-Portal Act of 1947, 29 U.S.C. § 260. According to the Commissioner, because § 11 of the Portal-to-Portal Act "limit[ed] the availability" of liquidated damages in cases where the employer has acted in good faith, those damages no longer serve a compensatory purpose but rather serve only to punish employers who act in bad faith. In fact, § 260 merely provides the court with the *discretion* to remit liquidated damages where the employer meets a stringent test of good faith and reasonable grounds. Conversely, an employee can, in the court's discretion, recover liquidated damages even against an employer who meets that stringent test.

Thus, liquidated damages under the FLSA cannot be considered punitive. Indeed, even the Commissioner has taken the position -- in a revenue ruling issued more than two decades after enactment of the Portal-to-Portal Act -- that liquidated damages under the FLSA, as amended by the Portal-to-Portal Act, are compensatory, not punitive. *See* Rev. Rul. 69-581, 1969-2 C.B. 25.

ADEA damages also meet the *Burke* test. The ADEA incorporates the FLSA's remedial scheme, including provisions for backpay and liquidated damages, although it limits the availability of liquidated damages to cases where the violation of the statute is willful. This court has held that Congress intended for those remedial provisions of the FLSA that were incorporated into the ADEA to have the

same meaning as under the FLSA. *Lorillard*, 434 U.S. at 581 (1978). Both Congress's use of the FLSA term "liquidated damages" in the ADEA remedial scheme and the case law establish that ADEA liquidated damages, like FLSA liquidated damages, compensate for "intangible elements of injury" which are "not pecuniary in their immediate consequence."

The Commissioner's reliance on *Trans World Airlines* v. *Thurston*, 469 U.S. 111 (1985), as confirming her notion that ADEA liquidated damages are "solely" punitive is misplaced, for four reasons. First, *Thurston* dealt only with *when* a violation should be considered willful. Second, numerous cases in the Courts of Appeals have found, post-*Thurston*, that ADEA liquidated damages serve both a compensatory and punitive purpose. Third, the limited availability of ADEA liquidated damages represents nothing more than a legislative compromise between the interests of employers and employees: only employers who are willful violators are made liable for intangible, nonpecuniary injuries. It does not imply a judgment on Congress's part that liquidated damages are solely punitive in nature.

Fourth, the Commissioner's litigating position is inconsistent with her recent revenue ruling interpreting § 104(a), Rev. Rul. 93-88. The Commissioner argues that damages which may be awarded only against especially culpable defendants are inherently punitive and thus cannot be considered compensatory within the meaning of § 104(a). Yet she has taken the position in Rev. Rul. 93-88 that damages which may be awarded only in cases of intentional discrimination under the Civil Rights Act of 1991 do meet the *Burke* test and hence are excludible from income under § 104(a).

ARGUMENT

I. FLSA LIQUIDATED DAMAGES MEET THE *BURKE* TEST

A. This Court Has Established That Liquidated Damages Under The FLSA Compensate For Intangible, Non-Pecuniary Injuries.

The FLSA was enacted by Congress in 1938 in order to "protect certain groups of the population from sub-standard wages and excessive hours which endangered the national health and well-being." *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 706 (1945). This goal was accomplished, in part, by "eliminating starvation wages." *See Bumpus* v. *Continental Baking Co.*, 124 F.2d 549, 552 (6th Cir. 1941). Thus, the FLSA prescribes a minimum wage which employers must pay (29 U.S.C. § 206), and requires overtime pay in certain circumstances (29 U.S.C. § 207). Under 29 U.S.C. § 216, employees may, in a private action for violation of § 206 or 207, recover (a) unpaid minimum wages and overtime compensation, as well as (b) an additional equal amount as liquidated damages. Liquidated damages are automatic under the statute, although if the employer "shows to the satisfaction of the court that the act or omission giving rise to [the lawsuit] was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]" the court may, in its discretion, remit the award of liquidated damages in whole or in part. 29 U.S.C. §§ 216, 260.

The Commissioner does not dispute that, prior to 1947, liquidated damages awarded under the FLSA were compensatory. *See* Pet. Brf. at 22-23 & 26 n.17. As this Court held in *Overnight Motor Transportation Co.* v. *Missel*,

316 U.S. 572, 583-84 (1942), and reiterated in *Brooklyn Savings Bank*:

> "[T]he liquidated damage provision [of the FLSA] is not penal in its nature but constitutes compensation for the retention of a workman's pay which might result in *damages too obscure and difficult of proof for estimate other than by liquidated damages*." *Brooklyn Savings Bank*, 324 U.S. at 707 (emphasis added).

Thus, liquidated damages under the FLSA compensate for nonpecuniary losses. As the court explained in *Brooklyn Savings Bank*, the liquidated damages provision "constitutes a Congressional recognition that failure to pay the statutory minimum on time may be . . . detrimental to maintenance of the minimum standard of living 'necessary for health, efficiency and general well-being of workers.'" *Id.* Employees receiving less than the minimum "are not likely to have sufficient resources to maintain their well-being and efficiency until such sums are paid at a future date." Thus, "double payment must be made in the event of delay *in order to insure restoration of the worker to that minimum standard of well-being*." *Id.* at 707-08 (emphasis added). In short, employees who are deprived of the minimum wage to which they are entitled suffer detriment to their health and dignity that cannot be redressed simply by later repayment of the lost wages.

Damages that are "obscure and difficult of proof" and that compensate for "detriment[] to" the worker's "health . . . and general well-being" clearly meet the *Burke* standard of providing compensation for "intangible elements of injury" which are "not pecuniary in their immediate consequence."

B. The Portal-to-Portal Act Did Not Vitiate This Court's Holdings That FLSA Liquidated Damages Are Compensatory.

The Commissioner contends that liquidated damages under the FLSA must now be considered punitive rather than compensatory, i.e., that the holdings of this court in *Overnight Motor Co.* and *Brooklyn Savings Bank* are no longer valid, because of the amendments made to the FLSA in the Portal-to-Portal Act of 1947.[2] Section 11 of that Act, 29 U.S.C. § 260, permits a court to remit liquidated damages if the employer has met strict tests of both good faith and reasonableness. The Commissioner states that the amendment "limit[ed] the *availability* of liquidated damages under [the FLSA] in situations where the employer had acted 'in good faith' and with 'reasonable grounds for believing that his act or omission was not a violation' of the Act." (Pet. Brf. at 22, emphasis added.) She suggests that liquidated damages are not available in these situations and asserts that, as a result, "[l]iquidated damages under the . . . FLSA (after 1947) are not compensatory; they are available as a deterrence to those employers who do not act in 'good faith.'" (*Id.* at 26 n.17.)

That characterization of the Portal-to-Portal Act is inaccurate. Section 11 provides in relevant part that:

> "[I]f the employer shows to the satisfaction of the court that the act or omission giving rise to [the lawsuit] was in good faith *and* that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA], the court *may, in its sound discretion*, award no

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[2] Act of May 14, 1947, ch. 52, § 11, 61 Stat. 89.

liquidated damages or award any amount thereof not to exceed [full liquidated damages under § 216]." 29 U.S.C. § 260 emphasis added).

Thus, the Portal-to-Portal Act does not make liquidated damages "unavailable" in any situation. It simply provides that in exceptional cases the court *may*, in its discretion, remit liquidated damages in whole or in part. The conditions that must be met for the court to have this discretion are rigorous: the employer must show both a subjective good faith intention to meet the dictates of the FLSA, and that its judgment was objectively reasonable. *See Williams* v. *Tri-County Growers, Inc.*, 747 F.2d 121, 129 (3d Cir. 1984).

Moreover, even when an employer meets this "substantial burden," the court may still award full liquidated damages in addition to back wages. *McClanahan* v. *Mathews*, 440 F.2d 320, 323 (6th Cir. 1971). *See also Hayes* v. *McIntosh*, 604 F.Supp. 10, 21 (N.D. Ind. 1984) ("Should the court find that the defendants did act in good faith and had reasonable grounds to believe that they were not violating the Wage and Hour laws, the court still has the discretion to award liquidated damages.")[3]

Congress passed the Portal-to-Portal Act because it was keenly concerned with the FLSA's financial impact on employers. The Findings and Policy section sets out those concerns explicitly: interpretations of the FLSA had created "wholly unexpected liabilities, immense in amount and

[3] The Department of Labor, charged with administering the FLSA, agrees with this interpretation. *See* 29 C.F.R. § 790.22(b) ("If these conditions are met by the employer against whom the suit is brought, the court is permitted, *but not required*, in its sound discretion to reduce or eliminate the liquidated damages which would otherwise be required in any judgment against the employer.") (emphasis added).

retroactive in operation" which, if permitted to stand, would "bring about financial ruin of many employers and seriously impair the capital resources of many others," as well as adversely affect the public fisc by creating claims for refunds of taxes and by increasing the cost to the government of goods and services purchased both in the future and in the past (during World War II).[4] It is difficult to see why, under these circumstances, Congress would permit the "punishment" of employers whose violations of the Act were both reasonable and in good faith. Rather, the only rational purpose that Congress could have had for allowing courts to award liquidated damages against such employers is to compensate the employee. It is not surprising, then, that the Commissioner cites no support in the legislative history for her position that the Portal-to-Portal Act changed the nature of liquidated damages under the FLSA.

Nor is it surprising that many courts have held since passage of the Portal-to-Portal Act that liquidated damages under the FLSA are compensatory and not punitive. See, *e.g.*, *Marshall* v. *Brunner*, 668 F.2d 748, 753 (3d Cir. 1982). The District of Columbia Circuit directly addressed the effect of the Portal-to-Portal Act on the compensatory nature of liquidated damages under the FLSA in *Thompson* v. *Sawyer*, 678 F.2d 257, 281 (D.C. Cir. 1982), a case brought by a government employee for violation of the Equal Pay Act of 1963, 29 U.S.C. § 206(d).[5] The government

[4] The Findings and Policy section is section 1 of the Portal-to-Portal Act, 29 U.S.C. § 251. The principal focus of the Act, of course, was to eliminate "portal-to-portal" liability -- liability of employers for time spent by employees while engaged in so-called "preliminary" or "postliminary" activities. 29 U.S.C. § 254(a).

[5] "Under the Equal Pay Act, employees have access to the recovery provided by the FLSA, including unpaid wages and an additional equal amount as 'liquidated damages,' 29 U.S.C. § 216(b), (c) (Supp. III 1979)." *Thompson*, 678 F.2d at 263.

contended that the plaintiff was not entitled to liquidated damages because: (1) the FLSA was being applied retroactively; (2) liquidated damages under the FLSA as modified by the Portal-to-Portal Act were penal; and (3) retroactive application of a penal provision was unconstitutional. *See id.* at 279-81. The court rejected the government's position, holding that "FLSA liquidated damages remain compensatory in character, even though they may be remitted." *Id.* The court explained:

> "Nothing in the statutory history of the Portal Act suggests that Congress was dissatisfied with the determination that liquidated damages were compensatory. Instead, the history of the Portal Act is replete with evidence that § 260 was intended to provide courts with flexibility when an award of liquidated damages would be unfair to the employer. *A legislative decision to allow courts to balance compensating employees against imposing costs on employers hardly transforms the award to a penalty.*" *Id.* (emphasis added, citations omitted).

Indeed, even the Commissioner has taken the position, prior to this case, that post-1947 FLSA liquidated damages are compensatory, not penal. In Rev. Rul. 69-581, 1969-2 C.B. 25, the Commissioner addressed the question of whether an employer's payments of liquidated damages under the FLSA are deductible ordinary and necessary business expenses or, rather, nondeductible penalty payments. The Commissioner found the payments deductible, reasoning that, "[t]he provisions of section 16(b) of the Fair Labor Standards Act of 1938 are *not penal* in nature. The liquidated damages provided for therein constitute *compensation* for delay in the payment of sums due under the Act. See *Overnight Motor Transportation* . . .

and *Brooklyn Savings Bank* . . . ." *Id.* at 26 (emphasis added).

In short, the holdings in *Overnight Motor Co.* and *Brooklyn Savings Bank* that FLSA liquidated damages compensate employees for injuries to their health and well-being that are "obscure and difficult of proof" remain good law. The FLSA remedial scheme meets the *Burke* test of including compensation for intangible elements of injury which are nonpecuniary in their immediate consequence.

II. ADEA LIQUIDATED DAMAGES MEET THE *BURKE* TEST

A. The Term "Liquidated Damages" Has The Same Meaning Under The ADEA As It Does Under The FLSA And Hence ADEA Liquidated Damages Compensate For Nonpecuniary Losses.

The ADEA's remedial provisions incorporate by reference those of the FLSA, and are to be interpreted in a similar manner. Congress directed generally that the ADEA be enforced in accordance with the "powers, remedies, and procedures" of the FLSA, and specifically that:

> "Amounts owing to a person as a result of a violation of [the ADEA] shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of [the remedial provisions of the FLSA]: *Provided*, That liquidated damages shall be payable only in cases of willful violations of [the ADEA]." 29 U.S.C. § 626(b).

This Court in *Lorillard* v. *Pons*, 434 U.S. 575 (1978), explained that "in enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions *and their judicial interpretation* and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation," *id.* at 581 (emphasis added). It elaborated that the "selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA." *Id.* at 582. Congress deliberately adopted by reference the precise term "liquidated damages" as used in the FLSA; the only change it made was, in the proviso, to the circumstances in which liquidated damages are available. *Id.* at 581-82. Congress gave no indication that the *meaning* of the term liquidated damages would differ from that in the FLSA and, as *Lorillard* teaches, in the absence of an express change, the meaning remains the same.

As demonstrated above, *see* Part I, FLSA liquidated damages compensate for intangible, nonpecuniary personal injuries. While the intangible injuries suffered by victims of age discrimination may in some cases be different from those suffered by workers who do not receive their statutory minimum wages on time, it is clear that by importing the remedy of FLSA liquidated damages, Congress intended to compensate for the nonpecuniary losses suffered by ADEA claimants.

The case law supports this view. Thus, *Schmitz* v. *Commissioner*, 34 F.3d 790 (9th Cir. 1994), relied on *Brooklyn Savings Bank*'s interpretation of the FLSA to conclude that "[ADEA] liquidated damages 'serve to compensate the victim of age discrimination for certain nonpecuniary losses,'" *id.* at 793 (citations omitted). The *Schmitz* court then gave specific examples of such injuries:

> "emotional distress . . . [plaintiffs] may suffer upon return to work . . . lost reputation . . . their families' emotional distress and suffering . . . or any number of other injuries. . . . [However, b]ecause each employee's injuries differ – in ways that cannot be calculated – we need not devise a consistent explanation of the precise injuries ADEA liquidated damages redress. Rather, we believe that Congress's use of the term *liquidated* is dispositive." *Id.*, at 796 n.8 (emphasis in original).

Accord Graefenhain v. *Pabst Brewing Co.*, 870 F.2d 1198, 1205 (7th Cir. 1989) ("[ADEA] liquidated damages ... serve as compensation for a discharged employee's *nonpecuniary losses*") (emphasis added); *Powers* v. *Grinnell Corp.*, 915 F.2d 34, 41-42 (lst Cir. 1990) (same). See also H.R. Rep. No. 950, 95th Cong., 2d Sess. 13-14 (1978) (Conference Committee Report to the Age Discrimination in Employment Act Amendments of 1978), *reprinted in* 1978 U.S.C.C.A.N. 528, 535 (same).

B. *Thurston* Does Not Establish That ADEA Liquidated Damages Serve Only A Punitive Purpose.

The proviso to the ADEA's remedial provision, 29 U.S.C. § 626(b), limits the award of liquidated damages for prevailing ADEA plaintiffs to "cases of willful violations." In *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 125-29 (1985), the Court was asked to decide the meaning of "willful" in that provision. Noting legislative history supporting the idea that ADEA liquidated damages were intended to have a deterrent effect, the Court concluded that Congress intended that liquidated damages be awarded only if "the employer knew or showed reckless disregard for the

matter of whether its conduct was prohibited by the ADEA." *Id.* at 126 (citation omitted).

In our view, *Thurston* establishes only the circumstances when a plaintiff can recover liquidated damages under the ADEA. The Commissioner claims to the contrary that, because *Thurston* characterized ADEA liquidated damages as "punitive in nature," such damages are "*solely* 'punitive in nature,'" and thus cannot serve any compensatory purpose. Pet. Brf. at 23 (emphasis added).

This argument has repeatedly been rejected in the Courts of Appeals. The issue was presented in the context of ADEA plaintiffs seeking pre-judgment interest in addition to liquidated damages. These plaintiffs reasoned that, since *Thurston* established that ADEA liquidated damages were meant to punish employers, such damages could not also serve the function of compensating plaintiffs for delay. The ADEA plaintiffs thus argued that they were entitled to prejudgment interest in addition to liquidated damages, contrary to the holding as to the FLSA in *Brooklyn Savings Bank*.[6] This argument has generally failed. A significant majority of Courts of Appeals have held, after considering *Thurston*, that ADEA liquidated damages serve a compensatory function in addition to a punitive function.

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[6] *Brooklyn Savings Bank* held that pre-judgment interest under the FLSA was not available because liquidated damages already compensated the plaintiffs for delay. 324 U.S. at 715-16. The vast majority of Courts of Appeals had held, prior to *Thurston*, that this reasoning applied equally in the ADEA context. *See e.g., Kolb* v. *Goldring, Inc.*, 694 F.2d 869, 875 (1st Cir. 1982); *Spagnuolo* v. *Whirlpool Corp.*, 641 F.2d 1109, 1114 (4th Cir. 1981); *Rose* v. *National Cash Register Corp.*, 703 F.2d 225, 230 (6th Cir. 1983); *Gibson* v. *Mohawk Rubber Co.*, 695 F.2d 1093, 1101-03 (8th Cir. 1982); *Blim* v. *Western Elec. Co.*, 731 F.2d 1473, 1479-80 (10th Cir. 1984). *But see Criswell* v. *Western Airlines, Inc.*, 709 F.2d 544, 556-57 (9th Cir. 1983).

Thus, the Seventh Circuit held in *Graefenhain* that "while liquidated damages serve a deterrent or punitive function, Congress also intended liquidated damages to serve as compensation for a discharged employee's *nonpecuniary losses*." 870 F.2d at 1205 (emphasis added). The First Circuit similarly concluded in *Powers* that ADEA liquidated damages have both a compensatory and a punitive purpose. The court noted that *Thurston* focused only on *when* liquidated damages could be awarded, and did not consider whether liquidated damages may simultaneously serve a compensatory function. *See Powers*, 915 F.2d at 41. And in *Blum* v. *Witco Chemical Corp.*, 829 F.2d 367, 382 (3d Cir. 1987), the Third Circuit also held that liquidated damages had both a compensatory and a punitive purpose. *See also Hamilton* v. *1st Source Bank*, 895 F.2d 159, 166 (4th Cir. 1990) ("*Thurston* did not address the issue of prejudgment interest, and its holding regarding liquidated damages as punitive was in the context of defining the standard for 'willfulness'"); *Burns* v. *Texas City Refining, Inc.*, 890 F.2d 747, 752 (5th Cir. 1989) (holding, post-*Thurston*, that because the purpose of liquidated damages is to "provide for otherwise difficult to calculate costs such as the loss of the use of unpaid wages," an ADEA plaintiff could not recover both prejudgment interest and lost wages).[7]

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[7] *Downey* v. *Commissioner*, 33 F.3d 836 (7th Cir. 1994), held that ADEA damages either were "strictly punitive," or their sole function was to replace pre-judgment interest. The Court found it unnecessary to determine which view was correct. "In any event . . . they do not compensate for the intangible elements of a personal injury." *Id.* at 840. However, while pre-judgment interest may be subsumed within ADEA liquidated damages, such damages must include more than prejudgment interest, for two reasons. *First*, as the Seventh Circuit itself recognized in *Heiar* v. *Crawford County*, 746 F.2d 1190 (7th Cir. 1984):

> "When double damages are awarded, they usually will be far greater than would be necessary to compensate the plaintiff

(continued...)

C. The Limitation Of Liquidated Damages To Victims Of Willful Age Discrimination Represents Nothing More Than A Legislative Compromise Between The Interests of Employers and Employees.

The reason why the Commissioner's pivotal argument here -- that the limitation of ADEA liqudated damages to cases of willful violations establishes that they are solely punitive -- is unavailing was articulated most succinctly by the Ninth Circuit in *Schmitz*. That case involved the precise issue before the Court today: the excludibility of ADEA damages from income under IRC § 104(a). The *Schmitz* court held that limiting ADEA liquidated damages to victims of willful discrimination does not make those damages noncompensatory. Rather, it represents an ordinary legislative compromise between the interests of employers and employees:

> "the mere fact that liquidated damages are available in cases of 'willful' discrimination does not transform them into punitive damages or eliminate their compensatory purpose. . . . In

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[7] (...continued)

for delay – *far greater, that is, than an award of prejudgment interest would be*. Of course interest can mount up, but the short outside statute of limitations ... makes it unlikely that it will mount up to the point where it is equal to the principal." *Id*. at 1202 (emphasis added).

Second, pre-judgment interest does not fit the definition of liquidated damages established in *Brooklyn Savings Bank*: "damages too obscure and difficult of proof for estimate other than by liquidated damages." Pre-judgment interest is neither obscure nor difficult of proof. Once the amounts and dates of the lost wages are established and the interest rate selected, pre-judgment interest can be calculated by a simple mathematical formula.

> enacting ADEA, Congress was likely attempting to balance the need to compensate victims and deter discrimination with the need to protect businesses from crushing liability. . . . [W]e see nothing 'peculiar' in Congress's decision to resolve these competing interests by compensating victims of willful discrimination at a higher rate than victims of 'nonwillful' discrimination: Congress has simply decided as a public policy matter that only victims of willful discrimination should receive obscure and difficult to prove compensatory damages." *Schmitz*, 34 F.3d at 795.

In short, Congress's decision to limit liquidated damages to cases where the discrimination was willful does not represent a decision that plaintiffs' compensation shall be limited to lost wages. Rather, it is a decision that only particularly blameworthy employers will be liable for also compensating plaintiffs for intangible, nonpecuniary injuries.

Indeed, as the 1991 Civil Rights Act demonstrates, when Congress seeks to impose "solely" punitive damages, it does so expressly. *See* 42 U.S.C. § 1981a(b)(1) (If the defendant is shown to have acted with "malice or with reckless indifference to the federally protected rights of an aggrieved individual," the plaintiff may recover "punitive damages."). Congress's decision to provide for FLSA "liquidated" damages as a remedy in ADEA, rather than for expressly "punitive" damages, signals clearly Congress's intention. As *Schmitz* put it, "[i]f Congress said 'liquidated,' we will assume that Congress meant liquidated." 34 F.3d at 795.

D. The Limitation of ADEA Liquidated Damages to Situations Involving More Culpable Defendants is Similar to the Balancing of Remedies in the Civil Rights Statutes Which the Commissioner Has Recognized Meet the *Burke* Test.

The Commissioner's contention that the punitive aspect of ADEA liquidated damages renders them non-compensatory is inconsistent with her treatment of damages awarded for gender and race discrimination in Rev. Rul. 93-88, 1993-2 C.B. 61. After the 1991 Civil Rights Act, plaintiffs who have suffered intentional discrimination as a result of their race or gender can recover, in addition to backpay, other compensatory damages and punitive damages.[8] *See* 42 U.S.C. §§ 1981, 1981a(a)(1), and 2000e-5(g). Plaintiffs who can prove only disparate impact are limited to recovery of backpay. Rev. Rul. 93-88 holds that compensatory damages for intentional discrimination are excludible, even if a particular plaintiff receives only backpay; damages for disparate impact discrimination, however, are not excludible.

Thus, under the scheme existing after the 1991 Civil Rights Act, whether successful plaintiffs may recover compensatory damages beyond backpay depends on the culpability of their employers (disparate treatment or disparate impact).[9] By the logic in the Commissioner's

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[8] In the case of gender discrimination, compensatory damages other than backpay and punitive damages are limited in amount, *see* 42 U.S.C. § 1981a(b)(3)).

[9] As in the case of ADEA, Congress intended that damages for disparate treatment discrimination serve both a compensatory and deterrent purpose. *See, e.g.*, H.R. Rep. No. 40, 102d Cong., 1st Sess., pt. 1, at 69 (1991): (continued...)

brief, the additional compensatory damages serve only a punitive function because they are awarded only in cases where the employer is found to have greater culpability, and therefore they should not be excludible under § 104(a). However, Rev. Rul. 93-88 holds that the availability of compensatory damages beyond backpay renders all compensatory damages awarded to victims of disparate treatment discrimination excludible from income, and only damages for the lesser offense -- disparate impact -- are not.

The Commissioner's argument also is inconsistent with her treatment in Rev. Rul. 93-88 of damages received under the Americans With Disabilities Act, 42 U.S.C. § 12101-12213 ("ADA"). Pursuant to 42 U.S.C. § 1981a(a)(2), compensatory damages beyond backpay are available for a violation of § 102(b)(5)(A) of the ADA.[10] Under the holding of Rev. Rul. 93-88, all compensatory damages for such a violation are therefore excludible from income. Yet, pursuant to § 1981a(a)(3), the defendant has a complete defense to such damages if it can demonstrate good faith efforts, in consultation with the plaintiff, to identify and make reasonable accommodations that would provide an equally effective opportunity and not cause undue hardship. Thus, the Commissioner's ruling that these damages are excludible is impossible to reconcile with her litigating position that damages in such cases "are not compensatory;

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[9] (...continued)
"[m]aking employers liable for all losses -- economic and otherwise -- which are incurred as a consequence of prohibited discrimination, and which are proved at trial, will serve as a necessary deterrent to future acts of discrimination, both for those held liable for damages as well as the employer community as a whole." *See also* 137 Cong. Rec. H9526 (daily ed. Nov. 7, 1991).

[10] Section 102(b)(5)(A) makes unlawful the failure by a covered entity to make reasonable accommodations for the known physical or mental limitations of an otherwise qualified individual, unless those accommodations would cause an undue hardship to the entity.

they are available as a deterrence to those employers who do not act in 'good faith.'" Pet. Brf. at 26 n.17.

Both the civil rights statutes discussed in Rev. Rul. 93-88 and the ADEA are "part of a wider statutory scheme to protect employees in the workplace nationwide." *McKennon* v. *Nashville Banner Publishing Co.*, No. 93-1543, slip op. at 4 (Jan. 23, 1995). The common thread running through their remedial regimes is that Congress has chosen to strike a balance between the interests of plaintiffs and defendants by linking the ability of a plaintiff to recover compensatory damages for nonpecuniary harms to the level of culpability of the defendant. This linkage, however, does not convert compensatory damages to "solely" punitive damages.

III. THE COMMISSIONER'S REMAINING ARGUMENTS ARE MERITLESS

The Commissioner's remaining arguments deserve only brief mention. The Commissioner argues that ADEA liquidated damages are not excludible under § 104(a) because they are awarded "on account of" the defendant's willful misconduct rather than "on account of" the plaintiff's personal injury. This argument fails for three reasons. First, it is based on the faulty premise that ADEA liquidated damages are "solely" punitive. Second, it is inconsistent with Rev. Rul. 93-88. Third, it proves too much. It compels the conclusion that damages in an ordinary negligence action are not excludible. For the plaintiff to recover damages in any negligence action, the defendant must be shown to have violated a duty of care. By the reasoning in the Commissioner's brief, the plaintiff is awarded damages "on account of" the defendant's violation of the duty of care, not "on account of" plaintiff's injuries, and therefore the damages do not satisfy § 104(a)(2).

The Commissioner also argues that liquidated damages cannot be considered to compensate for intangible injuries because the amount of the liquidated damages award is calculated without consideration of the extent of those injuries. *See* Pet. Brf. at 20, 25 n.15. The Commissioner, however, misses the point of *liquidated* damages which is to avoid the necessity of proving and calculating the amount of obscure and difficult-to-prove damages. Thus, in *Atchison, T & S.F. Ry.* v. *Nichols*, 264 U.S. 348 (1924), this Court found that damages under a wrongful death statute which provided for a fixed liability of $5,000 were compensatory. The Court noted that, when the injuries suffered are difficult to estimate, it is within the power of the State to provide for a fixed amount of damages; such damages were "not less reparative" because the "reparation is in a fixed amount." *Id.* at 351-52.[11] See also *Molzof* v. *U. S.*, 112 S. Ct. 711, (1992).

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[11] By contrast, the Commissioner and *Downey* are incorrect in their implication that liquidated damages are solely a contractual remedy. *See* Pet. Brf. at 21 n.11; *Downey*, 33 F.3d at 846. While liquidated damages are frequently used in contractual situations, Congress and the States have also used them to compensate for tort-type injuries. Thus, *Rex Trailer Co.* v. *United States*, 350 U.S. 148 (1956), the very case cited by *Downey*, upheld an award of liquidated damages under the Surplus Property Act of 1944, 50 U.S.C. app. § 1635, 58 Stat. 765, 780, *repealed*, June 30, 1949, ch. 288, tit. VI, § 502(a)(1). These liquidated damages compensated the United States for difficult to prove damages from fraudulent misrepresentation, *see* 350 U.S. at 153-54, a classic tort. *See* RESTATEMENT (SECOND) OF TORTS § 525. Likewise, in *Nichols*, *supra*, 264 U.S. at 350-51, New Mexico chose to compensate at a fixed amount certain cases of wrongful death, which is also clearly a tort. *See also Molzof*, 112 S. Ct. at 716.

Moreover, the ADEA sets forth tort, not contractual, duties. The "public-law duty not to discriminate exists regardless of the parties' contractual relationship." *Schmitz*, 34 F.3d at 793. *See also Brooklyn Savings Bank*, 324 U.S. at 708-09 (liquidated damages under the FLSA, as public-private right, cannot be waived by contract). As this Court recently held, the rights and remedies provided by ADEA, far from being

(continued...)

The Commissioner also complains that evidence of the plaintiff's specific injuries is not even admissible in ADEA litigation. See Pet. Brf. at 18-19, 25 n.15. But where only liquidated damages are available, evidence of the specific damages incurred by the plaintiff is irrelevant. Indeed, it may even be prejudicial in a jury trial on the issue of liability. *See, e.g., Haskell* v. *Kaman Corp.*, 743 F.2d 113, 121 (2d Cir. 1984).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

Collette C. Goodman
(Counsel of record)
Julie M. Edmond
Robert B. Wasserman
Shea & Gardner
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Counsel for Amicus Curiae
Migrant Legal Action Program, Inc.

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[11] (...continued)
matters of contract, are "part of a wider statutory scheme to protect employees in the workplace nationwide." *McKennon*, slip. op. at 4.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ERICH AND HELEN B. SCHLEIER,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS AND THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

INTERESTS OF *AMICI CURIAE*

The American Association of Retired Persons (AARP) is a nonprofit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. AARP seeks through education, advocacy, and service to enhance the quality of life for all by promoting independence, dignity, and purpose.

More than one-third of AARP's thirty-three million members are employed individuals, most of whom are protected by the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (ADEA). One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and policies regarding work and retirement. Through its research, publications, and training programs, AARP seeks to eliminate ageist stereotypes, to encourage employers to hire and retain older workers, and to help older workers overcome the obstacles they face because of age.

The National Employment Lawyers Association (NELA) is a voluntary organization of almost 2,000 attorneys who specialize in the representation of the individual in controversies arising out of the workplace. NELA's membership and its governing body are composed of experts in state and federal equal employment opportunity statutes as well as wrongful discharge law. NELA has a direct interest in cases involving the civil rights statutes, as NELA members regularly counsel and represent clients in claims under these statutes.

As part of their respective advocacy efforts, AARP and NELA have filed numerous amicus curiae briefs in the United States Supreme Court and federal courts of appeals in cases involving employment and discrimination laws. In particular, AARP and NELA participated as amicus curiae in United States v. Burke, 112 S. Ct. 1867 (1992), McKennon v. Nashville Banner Co., 63 U.S.L.W. 4104 (U.S. Jan. 23, 1995), and Hazen Paper Co. v. Biggins, 113 S. Ct. 1701 (1993).

AARP and NELA concur with the arguments set forth by Respondents that ADEA damages should be excluded from gross income as compensation for personal injuries under Internal Revenue Code Section

104(a)(2). Amici submit this brief[1/] to focus on the provisions of the ADEA that Congress devised to redress the injuries caused by age discrimination. AARP and NELA's brief also explains the key differences between the statutory provisions of the ADEA and Title VII[2/], which are significant to the analytical framework of United States v. Burke, 112 S. Ct. 1867 (1992), as applied to the ADEA.

SUMMARY OF ARGUMENT

When Congress enacted the ADEA in 1967, it gave national recognition to the severity and pervasiveness of age discrimination in the workplace. McKennon v. Nashville Banner Publishing Co., 63 U.S.L.W. 4104 (U.S. Jan. 23, 1995), slip op. 4. Age discrimination "[has] a devastating effect on the dignity of the individual and result[s] in a staggering loss of human resources vital to the national economy." Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 410 (1985).

At issue in this case is whether ADEA damages are excludable from gross income as damages received on account of "personal injuries," under Internal Revenue Code Section 104(a)(2). There can be no doubt that age discrimination harms an individual's rights and personal dignity. There should also be no doubt that Congress carefully designed the ADEA to redress those injuries.

1/ The written consents of the parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

2/ Unless otherwise noted, references to Title VII are to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, prior to the amendments made by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

AARP and NELA submit that the ADEA evidences a tort-like conception of injury and remedy that recognizes the personal injury caused by age discrimination, consistent with the analytical framework of United States v. Burke, 112 S. Ct. 1867, 1873 (1992). The ADEA's purposes and its broad remedial measures, providing for a jury trial, both legal and equitable relief, and liquidated damages, reflect a tort-type statute. Therefore, ADEA damages should be excluded from gross income under IRC § 104(a)(2).

ARGUMENT

I. THE ADEA PROVIDES BROAD REMEDIAL MEASURES THAT REDRESS PERSONAL HARMS CAUSED BY AGE ISCRIMINATION.

When Congress enacted the ADEA, it was well aware of the personal harm inflicted by age discrimination. "I have long felt it is a particular tragedy to amputate a human being's function, to strip productive persons of their skills, cheating them of the dignity of self-support." 113 Cong. Rec. 31256 (1967) (Remarks of Sen. Young). This Court has also acknowledged Congress' conclusion that

> age discrimination was profoundly harmful in at least two ways. First, it deprived the national economy of the productive labor of millions of individuals.... Second, it inflicted on individual workers the economic and psychological injury accompanying the loss of the opportunity to engage in productive and satisfying occupations.

EEOC v. Wyoming, 460 U.S. 226, 231 (1983).

Age discrimination unquestionably causes personal injury, as the Commissioner concedes. The legislative

history of the ADEA emphasizes Congress' understanding of the personal harm inflicted by discrimination. It also reveals Congress' recognition that such injuries were difficult to measure.

As Representative Eilberg eloquently exhorted his colleagues to pass the ADEA, he decried the difficulty of measuring the harm of discrimination:

> The harm which these practices bring to the lives and families of these American workers is incalculable; the harm such practices bring to the strength of this Nation is intolerable...
>
> The financial and social costs, of course, are nothing compared with the costs in terms of human suffering and welfare which come about as the result of discriminatory practices in employment because of age. Employment plays a very important role in the makeup of the modern American and this role cannot be measured in the dollars he carries home on payday. Self-esteem, self-satisfaction, and personal security are important byproducts of employment in industrial America. To deny a person the opportunity to compete for jobs on the basis of ability and desire, solely because of unfounded age prejudice, is a most vicious, cruel, and disastrous form of inhumanity.

113 Cong. Rec. 34745 (1967). Similar sentiments were echoed by Representative Dwyer, as she urged passage of the ADEA:

> The cost of such experience in terms of mental anguish, family suffering, lost income, and damaged self-respect is too high to measure.

113 Cong. Rec. 34751 (1967).

Congress recognized that the personal harm age discrimination inflicted was difficult to measure, if not incalculable. But that does not mean that Congress was unable to devise some remedy to redress personal injuries. Rather, the measures Congress chose to remedy age discrimination -- legal and equitable relief, plus liquidated damages -- signify Congress' attempt to provide some relief for the very personal losses suffered by victims of age discrimination.

In particular, the provision of liquidated damages represents a "good faith effort to estimate actual damages that will probably ensue." See Black's Law Dictionary 6th Ed., 391 (1990). Indeed, by incorporating the liquidated damages provision of the Fair Labor Standards Act, 29 U.S.C. § 216(b), into the ADEA, Congress is presumed to have understood[3/] the meaning of liquidated damages as "compensation ... in damages too obscure and difficult of proof for estimate...." Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 583-584 (1942).[4/]

The damages scheme of the ADEA reflects Congress' effort to put rough measurements on the incalculable personal harms caused by discrimination. At the time, Congress apparently viewed these measures as sufficient to "compensate the plaintiff 'fairly for injuries caused by the violation of his legal rights.'" (citations omitted) Burke, 112 S. Ct. at 1871.

3/ "[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." Lorillard, Inc. v. Pons, 434 U.S. 575, 581 (1978).

4/ The Commissioner's brief in this case before the Fifth Circuit admits that "liquidated damages compensate for damages ... that are too obscure and difficult of proof for estimate." (citations omitted). Appellant's Brief at 25 in Commissioner v. Schleier, No. 93-5555 (5th Cir.).

While conceding that "discrimination based upon age can effect 'personal' injuries,"[5/] the Commissioner argues that the ADEA's remedies do not compensate at all for any personal injury, but are limited to economic losses. The Commissioner's arguments rest on two faulty premises. First, the Commissioner reasons that the remedial provisions of the ADEA seem to be more contractual in nature,[6/] rather than tort-like. Second, the Commissioner seems to suggest that a statute must contain explicit language permitting compensatory damages for traditional tort injuries, in order to be tort-like. Both premises are flawed.

The ADEA grants a right to older persons to be free from ageism in the workplace and imposes a duty on employers to refrain from ageist practices and policies. The rights and duties arise from the operation of the statute, which is the traditional definition of a tort. See Black's Law Dictionary, 1489 (6th ed. 1990).

Moreover, "[t]he public law duty not to discriminate exists regardless of the parties' contractual relationship."

5/ Petitioner's Brief at 10.

6/ This argument appears similar to the argument advanced by the Commissioner and rejected by the Ninth Circuit in Schmitz v. Commissioner, 34 F.3d 790, 793 (9th Cir. 1994), petition for cert. filed, (U.S. Nov. 23, 1994) (No. 94-944), that "ADEA actions are basically ex contractu."

The Commissioner argues that because jury trials and liquidated damages are available for contract claims, their inclusion in the ADEA negates a tort-type conception of the ADEA. Petitioner's Brief at 21, n.11. Yet, Burke relies on the availability of jury trials as an indicia of a tort-type statute, as discussed infra, pp. 11-12. Furthermore, neither the purpose, nor the amount of ADEA liquidated damages are contractually based, but derive from distinct statutory purposes to compensate individuals and to deter violations of the law. See discussion infra, p. 10.

Schmitz v. Commissioner, 34 F.3d 790, 793 (9th Cir. 1994). Indeed, the ADEA grants individual rights and imposes obligations on employers even where no contractual relation exists, such as between an employer and applicant in a hiring context. Schmitz, 34 F.3d at 793. Furthermore, this Court has emphasized "[t]he distinctly separate nature of these contractual and statutory rights." Alexander v. Gardner-Denver Co., 415 U.S. 36, 50 (1974).

As this Court recently declared, "the ADEA ... reflects a societal condemnation of invidious bias in employment decisions." McKennon v. Nashville Banner Publishing Co., 63 U.S.L.W. 4104 (U.S. Jan. 23, 1995), slip op. 4. Ageism violates the basic democratic principle that each person should be judged based on the individual merit rather than based on group characteristics.[7/] Age discrimination in employment negates the cherished goals of independence and fulfillment. The combination of the denial of opportunity and the loss of choice represents no less than an attack on individual freedom.[8/] To say that age discrimination injuries and remedies are founded on contractual principles denigrates the importance of individual rights and the national policy condemning age discrimination.

The second flaw in the Commissioner's position that the ADEA does not compensate for personal injuries is her overly technical view that a statute must denominate specific and traditional compensatory

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7/ E.B. Palmore, Ageism: Negative and Positive 7 (1990).

8/ Mildred and Claude Pepper Foundation, The Age Discrimination in Employment Law: Tapping Resources for Productive Aging: First Annual Report, 19 (1990).

damages in order to be tort-like.[9/] The Commissioner's brief improperly narrows the analysis under IRC § 104(a)(2) to one factor -- compensatory damages for traditional harms.[10/]

The Commissioner's restrictive approach clearly conflicts with this Court's emphasis on the "range" of statutory remedies available in determining a tort-like conception of remedy. Burke, 112 S.Ct. at 1871 (emphasis added). Indeed, the Court's reasoning in Burke is instructive that "Nothing in this remedial scheme purports to recompense ... for any of the other traditional harms associated with personal injury, such as pain and suffering .... Burke, 112 S. Ct. at 1873 (emphasis added). In recognizing that a statute should include "any"[11/] tort-type harms, the Court made room for a broad range of injuries and remedies, and did not restrict that range to the injuries or remedies listed by way of example.[12/]

9/ Petitioner's Brief at 18. The Commissioner quotes from Burke's reference to damages, "such as damages for emotional distress or pain and suffering," as if the Court's language mandates these explicit remedies for a statute to be considered "tort-like."

10/ Petitioner's Brief at 14-18. This Court has never addressed whether traditional compensatory damages for emotional distress or pain and suffering may be available under the ADEA's grant of "legal or equitable relief as may effectuate the purposes of the" Act, 29 U.S.C. § 626(c), and need not resolve the issue to conclude that ADEA damages serve a compensatory purpose.

11/ When the term "any" is used in a statute, this Court views the term as "imply[ing] a broad scope." Public Employees Retirement System v. Betts, 492 U.S. 158, 173 (1989).

12/ Similarly, the term "such as" "suggests enumeration by way of example, not an exclusive listing." Id.

Burke further considers the purposes of the remedy in its analysis:

> Although these damages often are described in compensatory terms, (citations omitted), in many cases they are larger than the amount necessary to reimburse actual monetary loss sustained or even anticipated by the plaintiff, and thus redress intangible elements of injury that are "deemed important, even though not pecuniary in [their] immediate consequence[s]." (citations omitted).

Burke, 112 S. Ct. at 1871. In other words, the function the damages serve is instructive for determining its relation to tort-type principles.

The purposes served by ADEA liquidated damages are particularly important here. The majority of courts have held that ADEA liquidated damages have both compensatory and deterrent aspects. See Schmitz v. Commissioner, 34 F.3d at 796 (citing cases).

The Commissioner's contrary view that ADEA liquidated damages are not compensatory at all, but exclusively punitive, is not sustainable.[13/] Indeed, a unanimous Court recently echoed the compensatory and punitive purposes of the ADEA's remedies in recognizing that "[t]he private litigant who seeks redress for his or her injuries vindicates both the deterrence and the compensation objectives of the

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[13/] The Commissioner's brief implies that the Court in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125-26 (1985), concluded that ADEA liquidated damages are "not compensatory." Petitioner's Brief at 20. Thurston did not examine the compensatory functions of the ADEA damages provisions at all or examine such damages "from the recipient's perspective." Schmitz v. Commissioner, 34 F.3d at 795. AARP and NELA concur with the arguments advanced by Respondents that ADEA liquidated damages have both compensatory and punitive aspects and will not repeat those arguments here.

ADEA." McKennon v. Nashville Banner Publishing Co., 63 U.S.L.W. 4104, slip op. at 5.

The harm to one's dignity and self esteem caused by ageist practices can be severe, albeit incalculable. By providing broad remedies in the ADEA, Congress sought to redress, not ignore, the personal injury inflicted by age discrimination.

II. THE JURY TRIAL AND DAMAGES PROVISIONS OF THE ADEA DIFFER SIGNIFICANTLY FROM TITLE VII.

In United States v. Burke, 112 S. Ct. 1867 (1992), this Court set forth an analytical framework for determining whether damages received on account of personal injuries are excludable from gross income under IRC § 104(a)(2). The majority in Burke viewed the remedial scheme of a statute as indicative of whether damages under the statute were tort-like. 112 S. Ct. at 1871.

Burke focused on two elements -- jury trials and the range of statutory remedies. 112 S. Ct. at 1873-74. The Court concluded that Title VII was not "tort-like," because it did not allow for a jury trial, nor did it provide for any damages beyond lost wages. 112 S. Ct. at 1874. In contrast to Title VII, the ADEA contains both of the elements that the Court found critical to its analysis in Burke.

The right to a jury trial is one of the hallmarks of a tort remedy, as this Court held in Burke. 112 S. Ct. at 1872. "Title VII plaintiffs, unlike ordinary tort plaintiffs, are not entitled to a jury trial." Burke, 112 S. Ct. at 1872.

Like tort plaintiffs, and unlike Title VII plaintiffs, ADEA plaintiffs have a right to a jury trial. 29 U.S.C. § 626(c)(2). Indeed, Congress granted ADEA plaintiffs this important right more than a dozen years

before providing a similar right to Title VII plaintiffs through the Civil Rights Act of 1991. See Pub. L. No. 102-166, 105 Stat. 1071. Furthermore, the right to a jury trial under the ADEA remains broader than the right under Title VII. The Civil Rights Act of 1991 limits the jury trial right to disparate treatment claims, id., whereas the ADEA contains no such limitation. See 29 U.S.C. § 626(c)(2).

The Commissioner attempts to minimize the import of the right to a jury trial as meaningless to the Burke analysis. Yet, this Court emphasized the availability of jury trials combined with the broad relief provisions as key components in determining whether a statute "sounds basically in tort." 112 S. Ct. at 1874.

The second element that the Court examined in Burke was the range of statutory remedies. The key question in this part of the Burke analysis is whether the availability of additional damages under the ADEA represents remedies "larger than the amount necessary to reimburse actual monetary loss sustained or even anticipated by the plaintiff...." 112 S. Ct. at 1871. The answer should be clearly "yes."

The courts below and the parties have focused on the ADEA's liquidated damages provision as a remedy in addition to back pay. The ADEA authorizes an award of liquidated damages to victims of age discrimination who can prove that their employer willfully violated the law. Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1708 (1993). In contrast, monetary relief under Title VII was limited to back pay, which the Court in Burke concluded was a critical deficiency in ruling that Title VII remedies were not tort-like. 112 S. Ct. at 1873.

Another statutory difference between the remedial provisions of the ADEA and Title VII is ADEA Section 626(c)(1), which grants a cause of action to

victims of age discrimination for "such legal or equitable relief as will effectuate the purposes of" the ADEA. 29 U.S.C. § 626(c)(1). In Lorillard, Inc. v. Pons, 434 U.S. 575 (1978), this Court focused on the language of the ADEA's provision for legal relief in distinguishing it from Title VII's remedial provisions. "Looking first to the statutory language defining the relief available, we note that Congress specifically provided for both "legal or equitable relief" in the ADEA, but did not authorize "legal" relief in so many words under Title VII." Lorillard, Inc. v. Pons, 434 U.S. at 584.

Disregarding this Court's view that "significant differences" exist between the "remedial and procedural provisions" of the ADEA and Title VII, Lorillard, Inc. v. Pons, 434 U.S. at 584, the Commissioner argues that the statutory scheme of the ADEA is like Title VII's remedial scheme.[14/] While the ADEA and Title VII share common purposes and contain a number of similar provisions, McKennon v. Nashville Banner Publishing Co., 63 U.S.L.W. 4104 (U.S. Jan. 23, 1995), slip op. at 5, the significant differences in the remedial provisions of the two statutes cannot simply be swept aside. As this Court emphasized in Lorillard, Inc. v. Pons, 434 U.S. at 584, Title VII did not authorize "legal" relief. Nor did Title VII contain any language authorizing remedies broad enough to further the purposes of the statute. Compare 42 U.S.C § 2000e-5(g). Nor did Title VII provide for liquidated damages.

Furthermore, the ADEA's provisions for jury trials and legal as well as equitable relief parallel some of the elements in other discrimination statutes, which the Court in Burke viewed as significant and different from Title VII. For example, the Court noted that both Section 1981, 42 U.S.C. § 1981, and Title VIII

[14/] Petitioner's Brief at 18-19.

of the Civil Rights Act of 1968 provide for jury trials and legal and equitable relief. Burke, 112 S. Ct. at 1873-74.[15/]

The 1991 amendments to Title VII adding provisions for jury trials and compensatory and punitive damages "signal[ed] a marked change in [Congress'] conception of injury redressable by Title VII." Burke, 112 S. Ct. at 1874, n.12. Following that signal, the Commissioner ruled that Title VII damages under the Civil Rights Act of 1991 are now excludable from gross income, even if the damages received are limited to back pay. Rev. Rul. 93-88, 1993-2 C.B. 61. Yet, the Revenue Ruling omits any consideration of ADEA damages, even though the 1991 amendments to Title VII arguably made its statutory scheme more like the ADEA.

The Commissioner's approach to the tax treatment of ADEA damages may be viewed as result-driven, if the result is that ADEA damages are taxable. The result is inconsistent and inequitable tax policy that devalues the serious damage caused by age discrimination.[16/]

[15/] While these two statutes also contain compensatory and punitive damages provisions, the Court did not rule that these specific damages alone determine the tort-like nature of a statute. See discussion supra p. 9.

[16/] The result of such policy becomes even more problematic when this approach is applied to damages received on account of multifaceted discrimination, such as age and gender, under both the ADEA and the amended Title VII. Claims of multifaceted discrimination, for example, brought by older women, have increased over the years and will continue to rise as older women make up a greater portion of the work force. See Francine K. Weiss, Employment Discrimination Against Older Women: A Handbook on Litigating Age and Sex Discrimination Cases 1 (1989).

CONCLUSION

For the foregoing reasons, AARP and NELA respectfully submit that ADEA damages, both back pay and liquidated damages, should be excludable from gross income as compensation received on account of personal injuries.

Respectfully submitted,

L. Steven Platt
Arnold and Kadjan
19 West Jackson Blvd.
Chicago, IL 60604
(312)236-0415

Counsel for *Amicus Curiae*
National Employment Lawyers Association

Cathy Ventrell-Monsees*
American Association of Retired Persons
601 E Street, N.W.
Washington, DC 20049
(202) 434-2060

Counsel for *Amicus Curiae*
American Association of Retired Persons

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No. 94-500

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,
v.
ERICH E. and HELEN B. SCHLEIER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS

DOUGLAS S. MCDOWELL
ANN ELIZABETH REESMAN
KIMBERLY L. JAPINGA *
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae Equal Employment Advisory Council
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS

The Equal Employment Advisory Council (EEAC") respectfully submits this brief *amicus curiae*. The written consent of all parties has been filed with the Clerk of this Court. This brief argues for affirmance of the decision of the court below and thus supports the position of the respondents.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council ("EEAC" or "Council") is a voluntary association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 300 major U.S. corporations, as

well as several associations which themselves have hundreds of EEAC's corporate members. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

Because of its interest in the application of the nation's civil rights laws, EEAC has, since its founding in 1976, filed over 350 briefs as *amicus curiae* in cases before this Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this *amicus* activity, EEAC has participated in numerous cases before this Court involving the proper interpretation of the Age Discrimination in Employment Act of 1967 (ADEA)[1].

All of EEAC's members are employers subject to the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, as well as other equal employment statutes and regulations. As employers, and as potential respondents to ADEA charges and other employment-

[1] *E.g., Hazen Paper Co. v. Biggins,* 113 S. Ct. 1701 (1993) (standard of proof for recovery of liquidated damages); *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991) (arbitrability); *Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 501 U.S. 104 (1991) (effect of state agency "no cause" finding); *Public Employees Ret. Sys. of Ohio v. Betts,* 492 U.S. 158 (1989) (application to employee benefits); *Hoffmann-La Roche, Inc. v. Sperling,* 493 U.S. 165 (class actions); *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111 (1985) (standard for liquidated damages).

related claims, EEAC's members are interested in whether damage awards under the ADEA are taxable. Indeed, EEAC filed a brief *amicus curiae* in *United States v. Burke,* 112 S. Ct. 1867 (1992), which raised the same issue under Title VII of the Civil Rights Act of 1964.

Thus, the issue presented is extremely important to the nationwide constituences that EEAC represents. Mr. Schleier claimed that his employer, United Air Lines, Inc., discharged him because of his age in violation of the ADEA. The case was settled, and half of the award was attributed to back pay and the other half was attributed to liquidated damages. Mr. Schleier did not pay taxes on the liquidated damages portion of his award. When the government issued a statutory notice of deficiency for failure to pay taxes on the liquidated damages, Mr. Schleier brought an action in the United States Tax Court arguing that the entire award should be excluded from his gross income because the award was on account of personal injury. Pet. App. 64a.[2] The United States Tax Court concluded that the entire settlement under the ADEA was excludable from Mr. Schleier's income because it was awarded on the basis of a personal injury. The United States Court of Appeals for the Fifth Circuit appropriately affirmed the tax court's opinion, holding that "[m]oney recovered under the ADEA is excludable from income for the purposes of taxation." Pet. App. 69a.[3] ADEA

[2] Citations to the Appendix to the Petition for a Writ of Certiorari are designated as Pet. App. ——.

[3] The unpublished opinion of the Court of Appeals for the Fifth Circuit below, No. 93-5555 (5th Cir. June 1, 1994), is reproduced at Pet. App. 68a-69a.

damages are awarded on account of a personal injury and therefore should be excluded from gross income.

Thus, the EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of EEAC's significant experience in these matters, EEAC is uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Respondent Erich E. Schleier was a former United Air Lines, Inc. employee. United Air Lines had a policy that required individuals to retire at the age of sixty. Mr. Schleier filed suit in district court, alleging that his termination violated the Age Discrimination in Employment Act of 1967 (ADEA). The complaint was consolidated within a class action suit against United Air Lines, Inc. On June 30, 1986, the class action was settled. One half of the class members' settlement was attributed to back pay and the other half to liquidated damages. Pet. 3.[4]

Mr. Schleier paid tax on the back pay portion of his award as income, but did not pay tax on the liquidated damages portion of the settlement. The Commissioner of Internal Revenue issued a notice of deficiency, asserting that the liquidated damages were improperly excluded from his gross income. Pet. 3-4.

Mr. Schleier filed suit in the United States Tax Court alleging that the liquidated damages portion of the settlement was properly excluded from the gross income under Section 104(a)(2) of the Internal Rev-

[4] Citations to the Petition for a Writ of Certiorari are designated as Pet. ——.

enue Code, which states that "gross income does not include the amount of any damages received . . . on account of personal injuries or sickness." 26 U.S.C. § 104(a)(2). He further argued that the back pay portion of his settlement also was excludable from gross income under Section 104(a)(2). Mr. Schleier filed a motion for summary judgment. On July 7, 1993, the Tax Court granted the motion, relying on its decision in *Downey v. Commissioner*, 97 T.C. 150 (1991), and *aff'd*, 100 T.C. 634 (1993), *rev'd*, 33 F.3d 836 (7th Cir.), *petition for cert. filed*, 63 U.S.L.W. 3476 (U.S. Dec. 5, 1994) (No. 94-999). The United States Court of Appeals for the Fifth Circuit affirmed the Tax Court's decision, stating that "[m]oney received under the ADEA is excludable from income for the purposes of taxation." Pet. App. 68a. The Commissioner of Internal Revenue is appealing the Fifth Circuit's decision.

SUMMARY OF ARGUMENT

The decision of the court below to exclude lost earnings and liquidated damages recovered under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.*, from gross income pursuant to section 104(a)(2) of the Internal Revenue Code, 26 U.S.C. § 104(a)(2), should be upheld. Section 104(a)(2) allows a damages award to be excluded from gross income if the statute creates a "tort-like" cause of action and compensates the individual for personal injury.

To determine whether a cause of action is "tort-like" and compensates an individual for personal injuries, this Court in *United States v. Burke*, 112 S. Ct. 1867, 1874 (1992), found that the availability of a jury trial and compensatory damages were con-

trolling. In amendments to the ADEA in 1978, Congress explicitly provided for a right to a jury trial and explained that liquidated damages provide "*full compensatory relief* for losses that are 'too obscure and difficult of proof for estimate other than by liquidated damages'." H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 14 (1978) (emphasis added).

It is clear, then, that Congress intended to compensate an aggrieved individual for damages "on account of personal injuries" when it allowed for a jury trial and provided liquidated damages. Because the ADEA compensates an individual "on account of personal injuries," ADEA awards are properly excluded from gross income under 26 U.S.C. § 104(a)(2).

Further, the nature of the cause of action and the potential relief determines the taxability of an award, not the specific award in a given case. According to Revenue Ruling 93-88, for example, awards consisting solely of backpay are excludable from gross income under the Civil Rights Act of 1991, the Americans with Disabilities Act (ADA), and 42 U.S.C. § 1981. Rev. Rul. 93-88, 1993-41 I.R.B. 4. The same reasoning should apply to the ADEA because the cause of action and the available remedy are determinative—not the actual award in a particular case.

Important public policy reasons also support excluding ADEA damages from gross income. If ADEA damages are not excluded from gross income, parties in an ADEA case face a number of unpalatable choices, regardless of whether they settle the dispute or take it to court. When an employee settles a claim under several statutes, including the Civil Rights Act of 1991, the ADA, 42 U.S.C. § 1981, and the ADEA, a decision must be made whether to: 1) apportion

the award among the various statutes and pay taxes on the ADEA portion, but face the uncertainty of whether the apportionment will hold up under IRS scrutiny; or 2) declare the entire award as exempt from gross income and risk being challenged by the IRS for failure to pay taxes on the ADEA award.

To avoid those problems, there will be a temptation on the part of the parties to allocate all the relief to Title VII, the ADA, or § 1981 claims in order to avoid tax liability. This will encourage the filing of lawsuits under non-ADEA statutes (*e.g.*, ADA, Title VII as amended by the Civil Rights Act of 1991, and 42 U.S.C. § 1981) in order to take advantage of the tax status of a settlement or award under those statutes. This also will result in civil rights claims pled being at odds with an objective assessment of the strengths of the plaintiff's actual causes of action.

Further, differential tax treatment of various causes of action would put the IRS in the business of evaluating the strength and weaknesses of the causes of action when overseeing the parties' allocation of damages. The IRS does not have the expertise to make such judgments and should not be put in the position of second-guessing the parties' own evaluation of the value of the various claims.

Finally, one of the purposes of a settlement is to resolve such claims amicably so that the parties do not have to continue to disagree over those issues. Different tax treatment to various claims has the potential to frustrate settlements and risk reopening the merits of settled cases in order to deal with IRS tax deficiency claims.

ARGUMENT

I. AWARDS OF BACK PAY AND LIQUIDATED DAMAGES RECEIVED IN LITIGATION OR SETTLEMENT OF LITIGATION UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 ARE EXCLUDED FROM GROSS INCOME UNDER SECTION 104(A)(2) OF THE INTERNAL REVENUE CODE AS "DAMAGES RECEIVED ON ACCOUNT OF PERSONAL INJURIES OR SICKNESS"

Section 104(a)(2) of the Internal Revenue Code, 26 U.S.C. § 104(a)(2), excludes "[d]amages received . . . on account of personal injuries or sickness" from gross income.[5] Treasury regulations interpreting Section 104(a)(2) state,

> The term "damages received (whether by suit or agreement)" means an amount received (other than workmen's compensation) through prosecution of a legal suit or action based upon *tort or tort type rights* or through settlement agreement entered into in lieu of such prosecution.

29 C.F.R. § 1.104-1(c) (emphasis added).

The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, makes it "unlawful for an employer . . . to discharge any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1).

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[5] Section 104(a)(2) provides in relevant part,

> [g]ross income does not include—
>
> (2) the amount of any damages received (whether by suit or agreement and whether as lump sums or periodic payments) on account of personal injuries or sickness. . . .

A. In Order For Damages To Be Excluded From Gross Income Under Section 104(a)(2) Of The Internal Revenue Code, The Cause Of Action Must Be Tort-like And The Damages Must Be Received "On Account Of Personal Injuries"

In order for a damages award pursuant to a lawsuit or settlement of a lawsuit to be excluded from gross income under Section 104(a)(2) of the Internal Revenue Code, the statute must be "tort-like" and compensate the individual for personal injury.

> The essential element of an exclusion under section 104(a)(2) is that the income involved must derive from some sort of tort claim against the payor. . . . As a result, common law tort law concepts are helpful in deciding whether a taxpayer is being compensated for a "personal injury."

United States v. Burke, 112 S. Ct. 1867, 1870 (1992) (quoting *Threlkeld v. Commissioner*, 87 T.C. 1294, 1305 (1986) (internal quotation omitted), *aff'd*, 848 F.2d 81 (6th Cir. 1988)).

To determine whether a cause of action is "tort-like," "[r]emedial principles . . . figure prominently in the definition and conceptualization of torts." *Id.* at 1871. "[O]ne of the hallmarks of traditional tort liability is the availability of a broad range of damages to compensate the plaintiff 'fairly for injuries caused by the violation of his legal rights'." *Id.* (quoting *Carey v. Piphus*, 435 U.S. 247, 257 (1978)). These damages may include compensation for emotional distress, pain and suffering, or in the case of a

> [d]ignitary or nonphysical tort such as defamation. . . not only for any actual pecuniary loss (*e.g.*, loss of business or customers), but for "impairment of reputation and standing in the com-

> munity, personal humiliation, and mental anguish and suffering."

Id. at 1871-72 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)). Thus, a statute's remedial structure must be consistent with traditional tort liability and must compensate an individual for the personal injuries he or she has suffered.

In *Burke*, this Court held that prior to the 1991 amendments,[6] Title VII of the Civil Rights Act of 1964 did not compensate an employee for personal injuries in a tort-type action within the meaning of section 104(a)(2). The Court held that a statute "whose sole remedial focus is the award of backwages" does not redress a tort-like personal injury. *Burke*, 112 S. Ct. at 1873. "[I]n contrast to the tort remedies for physical and nonphysical injuries . . . Title VII does not allow awards for compensatory or punitive damages; instead, it limits available remedies to backpay, injunctions and other equitable relief." *Id.*

This Court in *Burke*, however, did not state that discrimination never constitutes a personal injury: "No doubt discrimination could constitute a 'personal injury' for purposes of § 104(a)(2) if the relevant cause of action evidenced a tort-like conception of injury and remedy." *Id.*

As examples of discrimination claims evidencing a personal injury, this Court distinguished the pre-1991 Title VII from the Civil Rights Act of 1991, 42 U.S.C. § 1981, and the fair housing provisions of Title VIII

[6] Section 102 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1072 (1991), codified as 42 U.S.C. § 1981a, added limited compensatory and punitive damages as Title VII remedies.

of the Civil Rights Act of 1968. The Civil Rights Act of 1991, 42 U.S.C. § 1981, and the fair housing provisions of Title VIII of the Civil Rights Act of 1968 all are tort-like and compensate an employee on the basis of a personal injury because the individual has a right to a jury trial and may recover compensatory damages.

> Under the Civil Rights Act of 1991, victims of intentional discrimination are entitled to a *jury trial*, at which they *may recover compensatory damages* for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses," as well as punitive damages. . . . [W]e believe that Congress' decision to permit jury trials and compensatory and punitive damages under the amended act signals a marked change in its conception of the injury redressable by Title VII. . . .

Id. at 1784 n.12 (emphasis added) (citation omitted).

> 42 U.S.C. § 1981 permits victims of race-based employment discrimination to obtain a jury trial at which "both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages may be awarded."

Id. at 1873-74 (quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975)).

> The Court similarly has observed that Title VIII of the Civil Rights Act of 1968, whose fair housing provisions allow for jury trials and for awards of compensatory and punitive damages, "sounds basically in tort" and "contrasts sharply" with the relief available under Title VII.

Id. at 1874 (quoting *Curtis v. Loether*, 415 U.S. at 195, 197; and citing 42 U.S.C. § 3613(c)).

B. Congress' Inclusion Of Jury Trials And "Liquidated Damages" In The ADEA Demonstrates Its Intent To Provide Relief For "Damages Received On Account Of Personal Injuries"

As this Court stated in *Burke*, a statute that provides for a jury trial and compensatory damages is awarding relief for "damages received on account of personal injuries or sickness." *Burke*, 112 S. Ct. at 1873-74 n.12. In the Age Discrimination in Employment Act Amendments of 1978, Congress gave the plaintiff a right to a jury trial[7] and explained that liquidated damages provide compensatory relief for damages that are too difficult to measure other than by liquidated damages. H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 14 (1978).

> Under section 7(b), which incorporates the remedial scheme of sections 11(b), 16 and 17 of the FLSA [Fair Labor Standards Act], "amount owing" contemplates two elements: First, it includes items of pecuniary or economic loss such as wages, fringe, and other job-related benefits. Second, it includes liquidated damages (calculated as an amount equal to the pecuniary loss) which compensate the aggrieved party for *nonpecuniary losses* arising out of willful violation of the ADEA.

Id. at 13-14 (emphasis added).

Further, Congress intended nonpecuniary losses to encompass more than just lost earnings:

> The conferees . . . agree to permit a jury trial on the factual issues underlying a claim for liquidated damages because the Supreme Court has made clear that an award of liquidated damages under the FLSA is not a penalty but rather is available in order to provide full compensatory relief for losses that are "too obscure and difficult of proof for estimate other than by liquidated damages."

Id. at 14 (quoting *Overnight Transportation Company v. Missel*, 316 U.S. 572, 583-84 (1942)). This point was underscored during the Senate debate on the Age Discrimination in Employment Act Amendments of 1978 Conference Report:

> The conference agreement provides that a party will be entitled to a jury trial on any issue of fact in an action by an individual for recovery of amounts owing to include items of pecuniary loss, such as wages and fringe benefits and other employee benefits as well as readily ascertainable consequential losses, such as moving expenses, which directly result from the violation. *In addition, juries are authorized to award liquidated*

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[7] Prior to the 1978 amendments, jury trials were not provided for in the ADEA. In the 1978 amendments, however, Congress was explicit in its intention to provide for a right to a jury trial:

> [S]enate amendment made explicit provision for a trial by jury in actions for monetary relief under the act. Subsequent to passage of the Senate amendment the Supreme Court in Lorillard against Pons held that the act as originally enacted did afford a right to trial by jury for claims for recovery of wages under the act. However, the court expressed no view on whether the act implicitly authorized a jury trial for claims for liquidated damages under the act. In adopting a revision of the Senate amendment, the conferees make clear that a jury trial is available for deciding those factual issues underlying claims for amounts owing as a result of a violation of the act. Liquidated damages are explicitly authorized as an amount owing under section 7(b) of the act.

124 Cong. Rec. H2272 (daily ed. March 21, 1978) (statement of Rep. Quie).

> *damages to compensate victims of discrimination for those losses which are too difficult of proof for estimate.*

124 Cong. Rec. S4449 (daily ed. March 23, 1978) (statement of Sen. Williams) (emphasis added).

Thus, Congress intended to compensate an aggrieved individual for damages "on account of personal injuries" when it allowed for a jury trial and provided liquidated damages.[8] Moreover, several circuit courts have found that the availability of a jury trial and the compensatory nature of the liquidated damages section makes the ADEA a tort-like statute, thereby rendering the damages excludable from gross income.[9]

In *Schmitz v. Commissioner*, 34 F.3d 790 (1994), *petition for cert. filed*, 63 U.S.L.W. 3462 (U.S. Nov. 23, 1994) (No. 94-944), the Ninth Circuit held that liquidated damages "[c]ompensate the taxpayer for intangible losses." *Id.* at 796. As to the nature of liquidated damages, the court stated,

> [e]xactly what injuries ADEA liquidated redress will inevitably vary from case to case; none of the cases the concurrence cites involve plaintiffs who were compensated for all of the damages mentioned. ADEA liquidated damages might compensate some plaintiffs for the emotional distress and future psychic injuries they may suffer upon return to work, for lost future wages which they cannot mitigate, for lost reputation, for their families' emotional distress and suffering, for the psychic toll of suing one's employer or any number of other injuries. . . . Because each employee's injuries differ—in ways that cannot be calculated—we need not devise a consistent explanation of the precise injuries ADEA liquidated damages redress. Rather, we believe that Congress's use of the term *liquidated* is dispositive.

Id. at 796 n.8. Thus, the court concluded that liquidated damages awarded under the ADEA should be excluded: "[A]DEA liquidated damages are, from the taxpayer's perspective, damages received on account of personal injury. They are therefore excludable under § 104(a)(2)." *Id. See also Schleier v. Commissioner*, No. 93-5555 (5th Cir. 1994) (holding that "[m]oney recovered under the ADEA is excludable from income for the purposes of taxation") and *Bennett v. United States*, 65 Fair Empl. Prac. Cas. (BNA) 1375, 1377 (1994) ("This court finds that ADEA redresses a tort-like personal injury because it provides a remedial structure consistent with traditional tort liability").

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[8] The government contends that this Court held in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S. Ct. 613 (1985), that the legislative history of the ADEA states that Congress intended for liquidated damages to be punitive in nature. This simply is not the case because 1) the discussion regarding liquidated damages in *Thurston* is dicta, and 2) as the court in *Rice v. United States*, 834 F. Supp. 1241, 1245 n.3 (E.D. Cal. 1993), pointed out,

> [*T*]*hurston* did not hold that the *sole* function of liquidated damages was punitive. And while the Court relied on Senator Javits' floor statement during the 1967 debate over the initial Act, the legislative history surrounding the 1978 Amendments shows that Congress intended liquidated damages to "compensate the aggrieved party for nonpecuniary losses arising out of a willful violation of the ADEA. . . ."

[9] *But see Downey v. Commissioner*, 33 F.3d 836 (7th Cir.), *petition for cert. filed*, 63 U.S.L.W. 3476 (U.S. Dec. 5, 1994) (No. 94-999); *Maleszewski v. United States*, 827 F. Supp. 1553 (N.D. Fla. 1993).

C. The Nature Of The Cause Of Action And The Potential Relief Available Determines The Taxability, Not The Specific Award In A Given Case

A recent Internal Revenue Ruling, Rev. Rul. 93-88, 1993-41 I.R.B. 4, holds that compensatory damages, including back pay, awarded under the Civil Rights Act of 1991, the Americans with Disabilities Act, and 42 U.S.C. § 1981, are excludable from gross income because the damages under each statute are awarded on account of a personal injury. As this Court recently noted in *McKennon v. Nashville Banner Publishing Co.*, No. 93-1543, 1995 U.S. LEXIS 699, at *9-13 (Jan. 23, 1995) (emphasis added), the ADEA incorporates some of the same antidiscrimination and remedial provisions from Title VII and the Fair Labor Standards Act.

> The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide. . . . The ADEA incorporates some features of both Title VII and the Fair Labor Standards Act, which has led us to describe it as "something of a hybrid." *Lorillard v. Pons*, 434 U.S. 575, 578 (1978). The substantive, antidiscrimination provisions of the ADEA are modeled upon the prohibitions of Title VII (internal citations omitted). Its remedial provisions incorporate by reference the provisions of the Fair Labor Standards Act of 1938. 29 U.S.C. § 626(b). When confronted with a violation of the ADEA, a district court is authorized to afford relief by means of reinstatement, backpay, injunctive relief, declaratory judgment, and attorney's fees. 29 U.S.C. § 626(b); *see also Lorillard v. Pons, supra,* at 584. In the case of a willful violation of the Act, the ADEA authorizes an award of liquidated damages equal to the backpay award. 29 U.S.C. § 626(b). The Act also gives federal courts the discretion to "grant such legal or equitable relief as may be appropriate to effectuate the purposes of [the Act]." *Ibid.*
>
> *The ADEA, in keeping with these purposes, contains a vital element found in both Title VII and the Fair Labor Standards Act: it grants an injured employee a right of action to obtain the authorized relief.* 29 U.S.C. § 626(c). *The private litigant who seeks redress for his or her injuries vindicates both the deterrence and the compensation objectives of the ADEA.*

Because the ADEA has a remedial scheme that awards damages on account of personal injury which is similar to Title VII, the ADA, and 42 U.S.C. § 1981, it follows that the Revenue Ruling is applicable to the ADEA.

The Revenue Ruling further specifies that damages are excludable from gross income even if the only award is back pay:

> (1) Compensatory damages, including back pay, received in satisfaction of a claim of disparate treatment gender discrimination under Title VII of the Civil Rights Act of 1964, as amended in 1991, are excludable from gross income as damages for personal injury under section 104(a)(2) of the Code. *This is true even if compensatory damages in such a case are limited to back pay.*
> . . .
>
> (2) Compensatory damages, including back pay, received in satisfaction of a claim of racial discrimination under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964 are excludable from gross income as damages for personal injury under section 104(a)(2) of the Code.

> This is true even if the compensatory damages in such a case are limited to back pay.
>
> Similar results will apply to amounts received under the Americans with Disabilities Act, 42 U.S.C. § 12101-12213.

Rev. Rul. 93-88, 1993-41 I.R.B. 4 (emphasis added).

Again, this same analysis is applicable to the ADEA. If an aggrieved individual recovers only back pay, the award is still excluded from income because the cause of action and the potential remedy compensate an employee on account of a personal injury. The actual award in any individual case is not the determinative factor—rather, a court must look to the nature of the cause of action and the available remedy.

II. TO FACILITATE SETTLEMENTS AND REDUCE THE BURDEN OF LITIGATION ON THE COURTS, DAMAGES AVAILABLE UNDER THE ADEA SHOULD BE EXCLUDED FROM GROSS INCOME

Important public policy considerations also support excluding ADEA damages from gross income. When an employee settles a claim under several statutes, including Title VII,[10] the Americans with Disabilities Act, and the ADEA, the parties must attempt to either: 1) apportion the award among the various statutes to determine the employee's and employer's tax obligations for purposes of the ADEA, but face the uncertainty of being sued by the Internal Revenue Service for failure to apportion the award appropriately; or 2) declare the entire award as exempt from income and risk being challenged by the Internal

[10] After the passage of the Civil Rights Act of 1991.

Revenue Service for failure to pay taxes on the ADEA award.

This situation hinders settlement because employers do not wish to be placed in the position of failing to withhold the appropriate taxes from a settlement. At the same time, employees do not wish to have funds withheld for taxes that would otherwise be theirs to keep. If the parties cannot surmount the hurdle of allocating the award, the case proceeds unnecessarily to trial.

If the parties do make an allocation, they still face uncertainty, as the *Robinson v. Commissioner*, 102 T.C. 116 (1994), demonstrates. In *Robinson*, a non-ADEA case, the plaintiffs prevailed against a bank in a suit based on breach of contract and tort claims for failure to release a lien on property. Although the plaintiffs had allocated 95 percent of the settlement to the tort claims (which would be excludable under § 104(a)(2)) when the Tax Court examined the tax treatment of the settlement, it found that the allocations were assessed solely to avoid federal tax liability, rather than reflecting the merits of the case. In addition, the court found that the allocations were "uncontested" and "nonadversarial." The tax court ultimately made its own allocations.

It follows that if ADEA damages are taxable, this same situation will occur any time an ADEA claim is paired with a Title VII, § 1981, or ADA claim—the parties will be forced to litigate the taxability of the award issue. This uncertainty, therefore, leads to more litigation, both from the IRS and the parties themselves.

Further, when several separate causes of action are alleged in a charge or complaint, it may be ex-

tremely difficult to make an allocation that will stand up under IRS scrutiny. For example, if the plaintiff is a 55-year old, disabled, black woman, there are at least four causes of action to which the settlement could be allocated: ADEA, ADA, Title VII and § 1981, not to mention state statutory and tort claims that may offer other remedies. Even if the parties undergo extensive discovery of the facts, it often will be impossible to unravel this "bundle" of rights in order to place a separate value upon each specific claim the plaintiff might have asserted in the charge or complaint.

Taxation of ADEA damages will create an economic incentive to allocate all the relief to Title VII, the ADA or § 1981 claims in order to avoid tax liability. Indeed, this situation will encourage the filing of lawsuits under these non-ADEA statutes in order to take advantage of the tax status of a settlement or award. Civil rights claims thus will proliferate and may be at odds with an objective assessment of the strength of various causes of action. Ironically, if the parties avoid ADEA claims in drafting their settlements, the plaintiff could lose the protections of the Older Worker Benefits Protection Act amendments to the ADEA, which are the only employment discrimination provisions that set up strict protections that must be included in all ADEA releases. *See* 29 U.S.C. § 626(f).

In addition, differential tax treatment of various causes of action would put the IRS and courts adjudicating tax disputes in the business of evaluating the strength and weaknesses of the causes of action when overseeing the parties' allocation of damages. The IRS does not have the expertise and the courts will not necessarily have the resources to make such

judgments and should not be put in the position of second-guessing the parties' own evaluation of the value of the various claims to which the settlement is allocated. Such judgments are inherently subjective and cannot be resolved without extensive discovery and examination of witnesses—the very types of inquiry that a settlement is designed to avoid.

Indeed, one of the purposes of a settlement is to resolve such claims amicably so that the parties do not have to continue to disagree over just such issues. Thus, not only would settlement be discouraged in many cases if various claims were given different tax status, but even settled cases would run the risk of being reopened on the merits in order to deal with IRS tax deficiency claims. As shown above, the ADEA's legislative history indicates that the statute was intended to remedy personal injuries. Thus, all these possible problems are easily avoidable by finding that ADEA damages are not taxable.

Finding that ADEA awards are not taxable will eradicate the uncertainty, relieve employers and employees from trying to appropriately allocate settlement funds, and facilitate the expeditious resolution of ADEA claims rather than furthering endless litigation.

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the decisions of the court below should be affirmed.

Respectfully submitted,

DOUGLAS S. MCDOWELL
ANN ELIZABETH REESMAN
KIMBERLY L. JAPINGA *
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

Attorneys for Amicus Curiae Equal Employment Advisory Council

* Counsel of Record

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No. 94-500

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1994

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

ERICH E. AND HELEN B. SCHLEIER,

Respondents

**On Writ of Certiorari To The
United States Court of Appeals
For The Fifth Circuit**

BRIEF *AMICUS CURIAE* OF PAN AM PILOTS TAX GROUP (NUMEROUS PAN AM PILOTS WHO PARTICIPATED IN THE SETTLEMENT OF AN ADEA CLASS ACTION LAWSUIT AGAINST PAN AMERICAN WORLD AIRWAYS) IN SUPPORT OF RESPONDENTS.

ROSEN, BIEN & ASARO
SANFORD JAY ROSEN
Counsel of Record
THOMAS NOLAN
155 Montgomery Street, 8th Floor
San Francisco, California 94104
Telephone: (415) 433-6830

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INTEREST OF *AMICI CURIAE*

Amici are close to 100 pilots who participated in the settlement of an EEOC enforcement lawsuit against Pan American World Airways, asserting violations of the Age Discrimination in Employment Act of 1967 (the "ADEA"), 29 U.S.C. § 621 *et seq.*[1/] The settlement was approved by the United States District Court for the Northern District of California in *EEOC v. Pan American World Airways, Inc.*, 1988 WL 224232, 52 Fair Empl. Prac. Cas. (BNA) 929 (N.D. Cal. June 17, 1988) (No. C-81-3636 RFP, C-81-4590 RFP) (settlement for $17.2 million in damages to the pilot claimants, injunctive relief, and additional money for attorneys' fees for claimants' private attorneys, just before closing argument). The Ninth Circuit sustained the settlement against a challenge from excluded objectors. *E.E.O.C. v. Pan American World Airways, Inc.*, 897 F.2d 1499 (9th Cir. 1990).

Since the *Pan Am* settlement, members of the "class" have been subject to tax audits and other IRS enforcement actions that make the outcome of the instant case critical to their interests.

SUMMARY OF ARGUMENT

Focusing on the remedies available under a given statutory scheme is not a consistent or reliable way of determining whether a given cause of action is sufficiently "tort-like" to qualify for exclusion from taxable income under § 104 (a)(2) of the Internal Revenue Code. A far more useful and accurate approach would be to focus broadly on the statute as a whole, looking to its nature and

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[1/] Letters of consent to the filing of this Brief have been lodged with the Clerk of the Court, pursuant to Rule 37.3.

remedial purposes. This broader approach is the approach advocated by Justice O'Connor in *United States v. Burke*, 504 U.S. ___, 112 S.Ct. 1867, 119 L.Ed.2d 34 (1992) (O'Connor, J. dissenting, joined by Thomas, J.). The Court should reconsider her approach, in light of the developments since *Burke*. Certainly it should not extend the holding of *Burke* unnecessarily to cause damages under the ADEA to be taxed.

ARGUMENT

I. The Majority's Approach in *United States v. Burke* Is Too Narrowly Tailored to The Facts In That Case To Provide A Rule Of General Application For The Analysis of Taxability Issues Under § 104 (a)(2) And The Court Should Reconsider the *Burke* Approach In Light of The Developments Since *Burke*.

> Focusing on remedies, it seems to me, misapprehends the nature of the inquiry required by § 104(a)(2) and the IRS regulation. The question whether Title VII suits are based on the same sort of rights as a tort claim must be answered with reference to the nature of the statute and the type of claim brought under it.

United States v. Burke, 504 U.S. ___, 112 S.Ct. 1867, 1878, 119 L.Ed.2d 34, 53 (1992) (O'Connor, J. dissenting, joined by Thomas, J.).

At issue in this case is the proper manner in which to answer what at first appears to be a relatively simple legal question: Are the damages awarded under a given statutory scheme sufficiently tort-like to qualify to be excluded

from taxable income under § 104(a)(2) of the Internal Revenue Code and the corresponding Treasury Regulations?

The majority approach in *Burke* was to answer this question by looking to the range and type of remedies available under a given statutory scheme (in that case the pre-1991 version of Title VII of the Civil Rights Act of 1964) rather than the nature and purposes of the statute itself. Amici have studied the briefs of the Petitioner and Respondent (in draft) in this case and are persuaded that, even applying the majority's analysis in *Burke*, all ADEA damages are "tort-like" and are wholly excludable from taxable income pursuant to § 104(a)(2).

There is no clear-cut, common sense reason, however, why an analysis of the question "are the damages tort-like enough" should be limited to, or primarily based upon, an analysis of the available remedies. The majority in *Burke* appears to have placed undue stress on that approach. *See*, *Burke*, 112 S.Ct. at 1871 (remedies "figure prominently in the definition and conceptualization of torts."); *id.* at 1872, n. 7 ("The concept of 'tort' is inextricably bound up with remedies").[2/]

One possible justification for the majority approach could be that the remedial scheme of a statute is an indicator of the nature of the injury being addressed, and that the injury itself, thus correlated, is a simple indicator of the tort-like quality of the statute. *See id.* at 1873 (pre-1991 Title VII backpay redresses "legal injuries of an economic character" and thus is essentially contractual in nature.) However, tort remedies also redress economic injuries, and

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[2/] Of course, as explained in Respondents' Brief, the majority in *Burke* was almost equally impressed and reliant upon the lack of a jury trial in the pre-1991 Title VII statutory scheme.

the Court's opinion in *Burke* seems to be focused more on the range of remedies than the nature of the injury being redressed by a given remedy. *See id.* at 1873 ("the circumscribed remedies available under Title VII stand in marked contrast not only to those available under traditional tort law, but under other federal antidiscrimination statutes as well.")

Upon closer examination it becomes evident that the correlation between a given remedial scheme and the nature of the injury redressed is uncertain and unreliable. The remedial schemes of Title VII, in its pre-1991 and post 1991 formulations, provide compelling evidence of this problem. Furthermore, frequently the same injury is wholly redressable under competing theories of liability that have different remedial schemes. *See, e.g.*, Prosser and Keeton, *Handbook Of The Law Of Torts* (5th ed. 1984) at 656, 657 (Explaining that "misfeasance or negligent affirmative conduct in the performance of a promise generally subjects an actor to tort liability as well as contract liability for physical harm to persons and other tangible things" using the example "when a patient contracts with a physician for medical treatment and the physician is guilty of negligence in diagnosis or treatment, there is liability on a tort theory as well as on a contract theory"); *id.* at 657 (explaining that in the aforementioned situation there "is both a breach of an implied promise and a breach of a duty imposed by law.").

A second possible justification for using judicial scrutiny of remedies as the primary tool for categorizing damage awards under § 104(a)(2) could be for the sake of judicial economy: an analysis of the remedies available would appear to be, at first blush, a relatively simple, consistent way of answering the question "is it tort-like enough to qualify for exclusion?"

The problem with this justification becomes clear from a review of decisions interpreting §104(a)(2) in the aftermath of this Court's decision in *Burke*, as the Tax Court and the various Circuit Courts have struggled to apply the majority approach outside the pre-1991 Title VII context. The fact that the courts have come up with different answers to the apparently simple question "is it tort like enough?" reveals that determining whether the remedies are sufficiently tort-like is not so easy a question. References as to the proper categorization of liquidated damages illuminate these difficulties. *Compare, Downey v. Commissioner*, 100 T.C. 634, 636 (1993) ("Liquidated damages under the ADEA serve to compensate the victim of age discrimination for certain non-pecuniary losses") and *Thompson v. Commissioner*, 866 F.2d 709, 712 (4th Cir. 1989) (liquidated damages awarded under the Equal Pay Act are both punitive and compensatory and "[a]s such, the liquidated damages award constituted compensation received through a tort or tort-type action for personal injuries") with *Downey v. Commissioner*, 33 F.3d 836, 840 (7th Cir. 1994) ("whatever the appropriate characterization of ADEA liquidated damages . . . as a matter of law they do not compensate for the intangible elements of a personal injury" and are therefor not tort-like).

To the limited extent that courts are able to agree whether ADEA liquidated damages have a compensatory purpose from the victim's standpoint, they are still unable to agree upon the proper characterization of those damages. *Compare, Schmitz v. Commissioner*, 34 F.3d 790, 794 (9th Cir. 1994) (ADEA liquidated damages compensatory and tort-like because they "compensate victims for damages which are too obscure and difficult to prove") with *Downey v. Commissioner*, 33 F.3d 836, 840 (7th Cir. 1994) (ADEA liquidated damages "as the name implies, compensate a party for those difficult to prove losses that often arise from a delay in the performance of obligations — as

a type of contract remedy."). *See*, Prosser, *Handbook of the Law of Torts* 635 (3rd ed. 1964) ("The relation between the remedies in contract and tort presents a very confusing field, still in the process of development, in which few courts have made any attempt to chart a path."); Prosser and Keeton, *Handbook of the Law of Torts* 655 (5th ed. 1984) ("the distinction between tort and contract liability, as between parties to a contract, has become an increasingly difficult distinction to make.")

The problem is that ADEA liquidated damages, like many other remedies, cannot be exclusively categorized as either a contract or a tort remedy. *See Burke*, 112 S.Ct at 1877-1878 (Souter, J. concurring) (although "there are good reasons to put a Title VII claim on the tort side of the line" it is also true that "Title VII's ban on discrimination is easily envisioned as a contractual term implied by law" and "[i]n sum, good reasons tug each way."). *But see, Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1205 (7th Cir. 1989) ("Congress also intended liquidated damages [under the ADEA and elsewhere] to serve as compensation for a discharged employee's nonpecuniary losses arising from the employer's willful misconduct"); H. Rept. 95-950 (Conf.) at 13 (1978) reprinted in 1978 U.S. Code Cong. & Admin News 528, 535 ("liquidated damages are calculated as an amount equal to the pecuniary loss which compensate the aggrieved part for non-pecuniary losses arising out of a willful violation of the ADEA").

As it turns out, the determination of what is and is not a tort is a difficult matter that has historically troubled legal scholars. In the introduction to their *Handbook of the Law of Torts* (5th ed. 1984), Prosser and Keeton note that "a really satisfactory definition of a tort has yet to be found" and then spend the next four pages provisionally adopting and then discarding as inadequate various definitions of a

tort. *See* Prosser and Keeton, *Handbook of the Law of Torts* at 1-5 (5th ed. 1984).

Some scholars have suggested that the distinctions between tort and contract law that were carved out in the nineteenth century are highly artificial, and particularly hard to maintain given the present similarities between tort remedies and contract remedies:

> Until the general theory of contract was hurriedly run up late in the nineteenth century, tort has always been our residual category of civil liability. As the contract rules dissolve, it is becoming so again. . . . Classical contract theory might well be described as an attempt to stake out an enclave within the general domain of tort. . . . We may take the fact that damages in contract have become indistinguishable from damages in tort as obscurely reflecting an instinctive, almost unconscious realization that the two fields, which had been artificially set apart, are gradually merging and becoming one.

G. Gilmore, *The Death Of Contract* at 87-88 (1974).[3/]

[3/] *See* Holmes, *The Path of the Law*, 10 Harv. L. R. 457 (as reprinted in Collected Legal Papers of Oliver Wendell Holmes (1920) at 175):

> The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it -- and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference.

See also, Posner, *Economic Analysis of Law* (1986) at 81 (defining contract law functionally, as concerned with deterring "people from

Prosser has an easier time in attempting to distinguish tort from contract, but when he does so, it is *not* by focusing on remedies, rather he focuses on the nature of the interest protected:

> The fundamental difference between tort and contract lies in the nature of the interests protected. Tort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by the law, and are based primarily upon social policy, and not necessarily the will or intention of the parties . . . Contract actions are created to protect the interest in having promises performed.

Prosser, *Handbook of the Law of Torts* at 634 (3rd ed. 1964). *See* Prosser and Keeton, *Handbook of the Law of Torts* at 1, n. 2 (5th ed. 1984) (quoting Lee, Torts and Delicts, 27 Yale L. J. 721, 723 (1918) for the idea that "a tort is usually defined negatively in such terms as to distinguish it from breach of contract"); Posner, *Economic Analysis of Law* at 147 (1986)("[w]rongs that subject the wrongdoer to a suit for damages by the victim, other than breaches of contracts, are called torts."). *See also*, Prosser and Keeton, *supra*, at 6 ("So far as there is one central idea it would seem to be that it is that liability must be based upon conduct which is socially unreasonable. The common thread woven into all torts is the idea of unreasonable interference with the interests of others."); Black's Law Dictionary at 1489 (6th ed. 1990) (defining tort: "There must always be a violation of some duty . . . and generally such duty must arise by operation of law and not by mere agreement of the two parties.")

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behaving opportunistically toward their contracting parties, in order to encourage the optimal timing of economic activity and make costly self-protective measures unnecessary."); *id.* at 105-123 (discussing the broad range of available contract remedies).

The narrow focus on remedies adopted by the majority in *Burke* may have functioned as an analytical tool in that case, but is poorly tailored to more general application. Amici urge the Court to take advantage of the instant case as an opportunity to adopt an approach that looks more broadly to the purposes of the statute under which the damages are awarded in an attempt to determine whether the action is more tort-like or more contract-like. This is the approach favored by Justice O'Connor in her dissent in *Burke*. *See Burke*, 112 S.Ct at 1878 ("In my view, the remedies available to Title VII plaintiffs do not fix the character of the right they seek to enforce. The purposes and operation of Title VII are closely analogous to those of tort law, and that similarity should determine the excludability of recoveries for personal injury under 26 U.S.C. § 104(a)(2).").

Such an approach is also favored by the vast majority of Circuit Court panels looking at the issue prior to *Burke*. *See, Thompson v. Commissioner*, 866 F.2d 709, 711 (4th Cir. 1989) ("In determining whether an award of damages is excludable from gross income, the nature of the cause of action and the injury to be remedied must be identified."); *Rickel v. Commissioner*, 900 F.2d 655, 661 (3rd Cir. 1990) (endorsing the view that "we must look to the nature of the claim and not to the consequences that result from the injury."); *Pistillo v. Commissioner*, 912 F.2d 145, 149 (6th Cir. 1990) ("Reviewing the nature of Pistillo's claim, we conclude that his age discrimination lawsuit is analogous to the assertion of a tort-type right to redress personal injuries."); *Redfield v. Insurance Co. of North America*, 940 F.2d 542 (9th Cir. 1991) ("we adopt the reasoning of the Third and Sixth Circuits and hold that age discrimination damages are tort-type recoveries for personal inju-

ries."). Such an approach is also consistent with this Court's focus in *Burke* as to whether or not a statutory scheme provides for a jury trial. *See Burke*, 112 S.Ct. at 1872-1874.

In the instant case, such a broad approach clearly favors the determination that ADEA is sufficiently tort-like to justify exclusion of ADEA damages from gross income under § 104(a)(2).

II. Justice O'Connor's Approach in *United States v. Burke* Offers A Pragmatic And Cogent Approach to The Analysis of Taxability Under § 104(a)(2)

Justice O'Connor's approach to taxability issues under § 104(a)(2) accords with the approach of those scholars who define torts (and distinguish torts from contract) functionally:

> Title VII makes employment discrimination actionable without regard to contractual arrangements between employer and employee. Functionally, the law operates in the traditional manner of torts: courts award compensation for invasions of a right to be free from certain injury in the workplace. Like damages in tort suits, moreover, monetary relief for violations of Title VII serves a public purpose beyond offsetting specific losses. . . . It is irrelevant for the purposes of Title VII that an employer profits from discriminatory practices; the purpose of liability is not to reassign economic benefits to their rightful owner, but to compensate employees for injury they suffer and to "eradicat[e] discrimination throughout the economy."

United States v. Burke, 112 S.Ct. 1867, 1878 (1992) (O'Connor, J. dissenting).[4/] The present case requires the Court to look at the nature and scope of ADEA, as well as its remedial structure, in order to determine whether damages awarded under ADEA are sufficiently "tort-like" to qualify for exclusion under § 104 (a)(2).

By its terms, the purpose of the ADEA is to "promote employment of older persons based upon their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621 (b). Thus, the ADEA is similar to tort law in its combination of goals: like tort law, ADEA is designed both to remedy harm suffered by discrete individuals *and* to further important social goals. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27 (1991) ("As Gilmer contends, the ADEA is designed not only to address individual grievances, but also to further important social policies"); *McKennon v. Nashville Banner Pub. Co.*, 63 USLW 4104, 4105 (U.S., January 24, 1995) ("The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions.").

A review of the legislative history of the ADEA reveals a tort-like concern with social policy and a tort-like intention to compensate the individual victims of socially

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4/ *See also, Price Waterhouse v. Hopkins*, 490 U.S. 228, 264 (1989) (O'Connor, J. concurring) ("Like the common law of torts, the statutory employment 'tort' created by Title VII has two basic purposes. The first is to deter conduct which has been identified as contrary to public policy and harmful to society as a whole . . . . The second goal is to 'make persons whole for injuries suffered on account of unlawful employment discrimination.' [*Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975)] at 418.")

undesirable behavior. Senator Javits' remarks upon the introduction of the ADEA to the full Senate in 1967 make clear the social policy goals of the legislation:

> [I]t is a sad day indeed when a man realizes that the world has begun to pass him by; that happens to us all sooner or later. But it is surely a much greater tragedy for a man to be told, arbitrarily, that the world has passed him by, merely because he was born in a certain year or earlier, when he still has the mental and physical capacity to participate in it as energetically and vigorously as anyone else. . . . there is simply a widespread irrational belief that once men and women are past a certain age they are no longer capable of performing even some of the most routine jobs. The answer to this kind of popular misconception is obviously a broad based program of information and education, and that is exactly what S. 830 provides for. At the same time, the experience of the states has shown that information and education alone are not enough; they must be coupled with the availability of formal remedial procedures to compel compliance with the law. . . .

113 Cong. Rec. 31254 (Nov. 6, 1967) (Remarks of Sen. Javits); *See also*, 113 Cong. Rec. 34741 (Remarks of Rep. Steiger) (endorsing the view that "the hiring policies of many employers are rooted in past prejudices and practices" and thus highlighting the need for the ADEA).

The compensatory purpose of the ADEA is underscored in the legislative history of the 1978 amendments to the act:

> The Supreme Court recently decided that a plaintiff is entitled to a jury trial in ADEA actions for lost wages, but it did not decide whether there is a right to a jury trial on a claim for liquidated damages *Lorillard v. Pons*, [434 U.S. 575,] 98 S.Ct. 866 (1978). Because liquidated damages are in the nature of legal relief, it is manifest that a party is entitled to have the factual issues underlying such a claim decided by a jury. The ADEA as amended by this act does not provide remedies of a punitive nature. The conferees therefore agree to permit a jury trial on the factual issues underlying a claim for liquidated damages because the Supreme Court has made clear that an award of liquidated damages under the FLSA is not a penalty but rather is available in order to provide full compensatory relief for losses that are "too obscure and difficult of proof for estimate other than by liquidated damages." *Overnight Transportation Company v. Missel*, 316 U.S. 572, 583-84 (1942).

H. Rept. 95-950 (conf.) 13, 14 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 528, 535.

Another clear indication that the ADEA is tort-like rather than in the nature of an implied contract term is the fact that it protects individuals who have not yet entered into a contractual relationship. *See, Rickel v. Commissioner*, 900 F.2d 655, 662 (3rd Cir. 1990) (noting that the scope of ADEA "goes beyond the mere employer-employee context, protecting individuals from various forms of discrimination even if they are not yet in a contractual relationship, e.g. refusal to hire contexts" and concluding "[t]hus, focusing on the nature of the claim, we are convinced that the taxpayer's discrimination suit under the

ADEA was analogous to the assertion of a tort type right to redress personal injury.").

Moreover, numerous cases have recognized that the age discrimination is fundamentally akin to personal injury. *Pistillo v. Commissioner*, 912 F.2d 145, 150 (6th Cir. 1990) ("The reality . . . is that Pistillo did suffer invidious age discrimination. Pistillo endured his employer's indignities, insults and age discrimination; suffered a dignitary tort; and was personally injured."); *Rickel v. Commissioner*, 900 F.2d 655, 663 n. 13 (3rd Cir. 1990) ("age discrimination . . . is a personal injury and an ADEA action to redress that injury is more like the assertion of a tort type right" than like contract); *Jay v. International Salt Co.*, 868 F.2d 179, 180 (5th Cir. 1989) (holding that for purposes of Louisiana statute of limitation, violation of state age discrimination law is a tort); *Dillon v. AFBIC Development Corp.*, 597 F.2d 556, 562 (5th Cir. 1979) ("An action based upon the federal antidiscrimination statutes is essentially an action in tort.").

III. Even If The Court Reaffirms Its *Burke* Analysis, That Analysis Requires The Exclusion Of Any ADEA Damages From Gross Income.

In her brief Petitioner argues that a proper analysis of the remedies available under ADEA shows that the damages should be included in gross income. Petitioner's position is mistaken.

The ADEA, in contrast to pre-1991 Title VII, affords plaintiffs a relatively broad and tort-like range of remedies. Many of the ADEA's substantive provisions closely parallel the language, design and purposes of Title VII, *see, e.g., O'Connell v. Ford Motor Company*, 11 Fair Empl. Prac.

Cas. (BNA) 1471, 1472 (E.D. Mich. 1975) (because ADEA provisions so similar to Title VII, standards developed under Title VII may be used in ADEA cases). However, the ADEA is not a clone of Title VII. For example, this Court recently underscored the differences between Title VII and the ADEA in the context of disparate treatment and disparate impact. *Hazen Paper v. Biggins*, 507 U.S. ___, 113 S.Ct. 1701, 1706, 123 L.Ed.2d 338, 346 (1993) ("[W]e have never decided whether a disparate impact theory of liability is available under the ADEA. . . and we need not do so here."); *id.*, 113 S.Ct. 1701 at 1710 (Kennedy, J. concurring, joined by Rehnquist, J. and Thomas, J.) ("[T]here are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA."); *see also, Lorillard v. Pons*, 434 U.S. 575, 584 (1978) (noting "significant differences" in the "remedial and procedural provisions" of Title VII and the ADEA). The point is this: Recognition of the differences in the two statutory schemes makes it necessary for the courts to address squarely in each significant instance whether the same approach applies equally to pre-1991 Title VII and the ADEA.

Significantly, in contrast to the pre-1991 Title VII, the ADEA imports its enforcement mechanisms from the Fair Labor Standards Act ("FLSA"). *See* 29 U.S.C. §626 (b), incorporating 29 U.S.C. §§ 211 (b), 216 (b), 216 (C), 217, 226 (b) and 226(c). Under the FLSA provisions which supply much but not all of the ADEA's remedial scheme, a plaintiff may recover unpaid wages plus an amount equal to the unpaid wages in liquidated damages. 29 U.S.C. 216 (b). The ADEA by contrast only permits the awarding of liquidated damages "in cases of willful violations of this chapter." 29 U.S.C. § 626 (b). Moreover, the remedial structure of the ADEA includes more than just the FLSA backpay and liquidated damages provisions.

> In any action brought to enforce this chapter the court shall have jurisdiction to grant such *legal or equitable relief as may be appropriate* to effectuate the purposes of this chapter, including without limitation judgements compelling employment, reinstatement, or promotion, of enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

29 U.S.C. § 626 (b) (emphasis added). There is, moreover, no parallel to the sweeping language of this section anywhere in the Title VII remedial scheme for employment discrimination. *Lorillard v. Pons*, 434 U.S. 575, 584 (1978) ("[C]ongress specifically provided for both 'legal or equitable relief' in the ADEA, but did not authorize 'legal' relief in so many words under Title VII"); *see* 42 U.S.C. § 2000e-5(g)(1) (allowing "any other equitable relief as the court deems appropriate" but containing no similar catch-all provision for legal relief.).

It is also significant that while arguing for the includability of ADEA damages in taxable income under the rationale of *Burke*, Petitioner ignores the presence of the jury trial in the ADEA remedial scheme and overlooks the similarity between the ADEA and the post-1991 Title VII which the Court in *Burke* took pains to distinguish from pre-1991 Title VII. *See Burke*, 112 S.Ct. 1867, 1874 n. 12 (discussing the 1991 amendments and stating that "we believe that Congress' decision to permit jury trials and compensatory and punitive damages under the amended act signals a marked change in its conception of the injury redressable by Title VII.")

There are two basic arguments that have been advanced in support of the proposition that ADEA liquidated damages are not excludable from taxable income under

§ 104(a)(2). The first is that because they are exclusively punitive, ADEA liquidated damages should not be excluded as they are given on account of willful misconduct and not on account of personal injuries. The second argument admits that ADEA liquidated damages are also compensatory, but insists that because they merely compensate for loss of prejudgement interest, they do not compensate for personal injury and rather are a sort of contract remedy. Both arguments must be rejected because they view the purposes of the ADEA liquidated damages remedy too narrowly.

First, Petitioner argues that ADEA liquidated damages are punitive. That position relies on this Court's observation in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125 (1985) that "[t]he legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature." However, in *Thurston*, the Court did not preclude the possibility of other purposes or functions of ADEA liquidated damages. That question was in no way before the Court in *Thurston*. Indeed, it is particularly significant that this Court observed less than two weeks ago in *McKennon v. Nashville Banner Pub. Co.*, 63 USLW 4104, 4106 (U.S., January 24, 1995) that the "private litigant who seeks redress for his or her injuries vindicates both the deterrence and the compensation objectives of the ADEA."

Statutes are capable of multiple purposes, and to say that punishing wrongdoing is one purpose is not to rule out the possibility that the statute is also intended as compensation to the victim of the wrongful conduct. *Powers v. Grinnel Corporation*, 915 F.2d 34, 41 (1st Cir. 1990) ("*Thurston* simply observes that liquidated damages serve a punitive function. *Thurston* did not concern, and does not intimate, whether liquidated damages under the ADEA simultaneously serve the compensatory function of indemni-

fying employees for prejudgement delays in recouping backpay"). *Schmitz v. Commissioner*, 34 F.3d 790, 793 (9th Cir. 1994) (ADEA "liquidated damages serve to compensate the victim of age discrimination for certain non-pecuniary losses and also serve a deterrent or punitive purpose.") (citations and internal quotation marks omitted).

There is ample reason to attribute a compensatory as well as a punitive purpose to the ADEA liquidated damages provision. *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1205 (7th Cir. 1989) ("Congress also intended liquidated damages to serve as compensation for a discharged employee's nonpecuniary losses arising from the employer's willful misconduct"); H. Rept. 95-950 (Conf.) at 13 (1978), reprinted in 1978 U.S. Code Cong. & Admin News 528, 535 ("liquidated damages are calculated as an amount equal to the pecuniary loss which compensate the aggrieved part for nonpecuniary losses arising out of a willful violation of the ADEA").

Second, Petitioner and some courts argue that even if ADEA liquidated damages are compensatory as well as punitive, they compensate only for the delay in payment, thus in effect replacing prejudgement interest and not compensating for injuries resulting from personal injury as required for exclusion under § 104 (a)(2). *See*, Petitioner's Brief at 18-19; *Downey v. Commissioner*, 33 F.3d 836, 840 ("whatever the appropriate characterization of ADEA liquidated damages . . . as a matter of law they do not compensate for the intangible elements of a personal injury" and are therefor not excludable under § 104(a)(2).).

However, the assertion that ADEA damages do not compensate for the intangible elements of personal injury as well as for any loss of prejudgement interest is simply mistaken. H. Rept. 95-950 (conf.) 13, 14 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 528, 535

(quoting *Overnight Transportation Company v. Missel*, 316 U.S. 572, 583-84 (1942), for the proposition that "an award of liquidated damages under the FLSA is not a penalty but rather is available in order to provide full compensatory relief for losses that are 'too obscure and difficult of proof for estimate other than by liquidated damages.'") *See also, e.g., Linn v. Andover Newton Theological School, Inc.*, 874 F.2d 1, 6 (1st Cir. 1989) ("The rule [barring recovery for liquidated damages and prejudgement interest] was based upon the view that Congress intended for liquidated damages under the ADEA to be compensatory in nature and to cover, *among other things*, loss due to delay — precisely what prejudgement interest protects against." (emphasis added)). In addition, Congress chose not to call the ADEA liquidated damages "prejudgement interest." Moreover, it is in the nature of any liquidated damages remedy to substitute for difficult to calculate losses, and prejudgement interest is not difficult to calculate.

Other evidence that the liquidated damage provision compensates for more than loss of prejudgment interest — evidence that it compensates in part for the emotional distress that results from being victimized by intentional age discrimination — comes from the fact that when the various circuit courts disallowed recovery for emotional distress damages under ADEA they did so partly on the grounds that the statutory scheme in place absent such provisions was sufficient to make victims of age discrimination whole.

The theory under which separate emotional distress damages might have been allowed under the ADEA was not altogether implausible. The notion was that the statutory language of 29 U.S.C. § 626 (b) conferring jurisdiction "to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including

without limitation..." was broad enough to encompass emotional distress damages. A number of district courts initially allowed such damages on the grounds that they were "appropriate to effectuate the purposes" of ADEA. *See, e.g., Rogers v. Exxon Research and Engineering Company*, 404 F.Supp 324, 327 (D.N.J. 1975) (arguing that "the ADEA essentially establishes a new statutory tort," pointing out that "the Supreme Court has also held that other civil rights statutes 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions,'" and listing cases in support of the latter proposition) (citations ommitted), *rev'd*, 550 F.2d 834 (3rd Cir. 1977), *cert denied*, 434 U.S. 1022 (1978).

Although the circuit courts uniformally disallowed the recovery of emotional distress damages under the ADEA, they did so in part on the basis of the belief that the remedial scheme in place without such additional provisions was sufficient to make victims of invidious age discrimination whole. *Slatin v. Stanford Research Inst.*, 590 F.2d 1292, 1296 (4th Cir. 1979) (no pain and suffering damages under ADEA); *Vasquez v. Eastern Airlines, Inc.*, 579 F.2d 107, 112 (1st Cir. 1978) ("inferring a damage remedy is not necessary to guarantee effectuation of the ADEA's broad goals. . . While we find that the statutory language, coupled with congressional purpose, indicates the correctness of limiting damages to those provided by the FLSA, we do not suggest permanently foreclosing remedies which might prove essential to guarantee the integrity of the statute."); *Dean v. American Sec. Ins. Co.*, 559 F.2d 1036, 1038-39 (5th Cir. 1977) ("To be sure, the Congress was not unaware of, or insensitive to psychological and other damages incident to age based employment discrimination. It is more logical to infer from the remedial enforcement scheme contemplated by the Act legislative intent to prevent such injuries though compliance therewith, and in

the event of non-compliance, prompt reinstatement, promotion or other equitable relief coupled with lost wages, and liquidated damages, if appropriate, rather than to read into the superficial phrase 'Legal Relief' wrenched from context, an intent to authorize the recovery of general damages after such injuries have been inflicted."), *cert. denied*, 434 U.S. 1066 (1978); *Rogers v. Exxon Research & Eng'r. Co.*, 550 F.2d 834, 840 (3rd Cir. 1977) ("Congress saw fit to restrict the penalty provisions of the Act to doubling the amount of lost earnings. To allow psychic distress awards in addition would in a very real sense thwart the limitation Congress thought advisable to impose."), *cert. denied*, 434 U.S. 1022 (1978).

For all of these reasons, the dual nature of the liquidated damages awards under the ADEA supports a finding that ADEA liquidated damages, as well as ADEA damages more generally, are "tort-like" and therefor properly to be excluded from taxable income pursuant to § 104(a)(2).

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Rosen, Bien & Asaro
Sanford Jay Rosen
Counsel of Record
Thomas Nolan
155 Montgomery St., 8th Floor
San Francisco, California 94104
Telephone: (415) 433-6830

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